IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-841

LESTER L. FULTON,
Respondent,

vs.

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Constitutional Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	11
Appendix A—Petition	A-1
Appendix B—Memorandum for Clerk	A-4
Appendix C—Motion to Set Aside Judgment and Petition for Review	A-5
Appendix D—First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review	A-13
Appendix E—Court Memorandum Opinion	A-34
Appendix F—Notice of Appeal to Supreme Court of Missouri	A-36
Appendix G—Order Transferring Cause to Missouri Court of Appeals, St. Louis District	A-37
Appendix H—Opinion of the Court of Appeals	A-39
Appendix I—Motion to Reinstate Appeal No. 36090, for Rehearing of Consolidated Appeals Nos. 36090 and 36091, or in the Alternative for Transfer to the St. Louis District of the Missouri Court of Appeals En Banc, or in the Alternative for Transfer to the Missouri Supreme Court	A-46

Appendix J—Order Denying Motion for Rehearing or Transfer to Court En Banc or Transfer to Supreme Court A-51

Appendix K—Application for Transfer of Consolidated Appeals 36090 and 36091 ..... A-53

Appendix L—Order Denying Transfer A-57

Appendix M—Points Relied On A-58

Cases Cited

Boddie v. State of Connecticut, 401 U.S. 371 (1971) 10
Booth v. Quality Dairy Co., 393 S.W.2d 845(2) (St.L.Ct. App., 1952) 8
Buchalter v. New York, 319 U.S. 427 (1943) 8
Department of Banking v. Pink, 317 U.S. 264 (1942).... 2
Johnson v. American Mutual Liability Insurance Co., 335 F. Supp. 390 (W.D.Mo., 1971) 8
Reynolds v. Stockton, 140 U.S. 254 (1891) 9, 10
Roberts v. Emerson Electric Mfg. Co., 338 S.W.2d 62 (Mo. Supp. 1960) 9
United States v. Healy, 376 U.S. 75 (1964) 2
Woods v. Kansas City Club, 386 S.W.2d (Mo.Supp., 1964) 9

Statutes and Miscellaneous Cited

Article 5, § 3 of the Constitution of the State of Missouri 6
Fourteenth Amendment to the Constitution of the United States of America 3, 7, 11
Section 290.140, Mo.Rev. Stat., 196[illegible] 3, 4, 8
28 USC § 1257(3) 2, 6

IN THE

SUPREME COURT OF THE UNITED STATES

No. .....

LESTER L. FULTON,
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vs.

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the Missouri Court of Appeals, St. Louis District entered in this action on August 5, 1975, which became final on denial of the defendant-appellant's application for transfer to the Missouri Supreme Court on November 10, 1975.

OPINIONS BELOW

The opinion of the Circuit Court of the City of St. Louis, Missouri is reprinted in Appendix E and the opinion of the Missouri Court of Appeals, St. Louis District is reprinted in Appendix H. Neither is reported as of this date.

JURISDICTION

The jurisdiction of this court is invoked under 28 USC § 1257(3).

The St. Louis City Circuit Court entered judgment against the defendant on September 28, 1973 by default in a total amount of $96,000 plus costs. The defendant sought, after the expiration of time for filing an appeal, to vacate the judgment on the grounds, among others, that it was void because it was entered in contravention of the defendant's rights to due process of law under the Fourteenth Amendment to the United States Constitution. The defendant's contention was that it had no notice or opportunity to appear at a hearing held on June 28, 1973, to prove up the plaintiff's damages and that damages were entered in the default judgment on causes of action which were not pleaded and of which the plaintiff had no notice. On February 20, 1974, the Circuit Court of the City of St. Louis, Missouri, entered its judgment denying the motion to vacate and on August 5, 1975, the Missouri Court of Appeals, St. Louis District entered its opinion affirming said Judgment. On August 19, 1975, defendant filed its Motion for rehearing or transfer to the court en banc which was summarily denied on September 8, 1975. On October 11, 1975 defendant filed its application for transfer of said appeal to the Missouri Supreme Court and on November 10, 1975, said application was summarily denied. This petition for a writ of certiorari has been filed within 90 days of November 10, 1975, as required by Rule 22. *Department of Banking v. Pink*, 317 U.S. 264 (1942); *United States v. Healy*, 376 U.S. 75 (1964).

QUESTIONS PRESENTED

Does entry of a judgment by default on claims or causes of action not included in the Petition served upon the defendant, and of which the defendant had no notice, violate defendant's right to due process of law under the Fourteenth Amendment to the Constitution of the United States of America?

Is a judgment entered upon claims or causes of action not pleaded, and of which defendant had no notice or opportunity to be heard, void as entered in violation of the defendant corporation's right to due process of law under the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves important questions concerning the right of a litigant in a State court to due process of law under the Fourteenth Amendment to the Constitution of the United States of America.

STATEMENT OF THE CASE

Plaintiff filed an action on March 14, 1973 against International Telephone & Telegraph Corporation (hereinafter ITT) alleging a claim for relief under § 290.140, Mo.Rev.Stat., 1969 (the Missouri Service Letter Statute). Count I of the Petition sought actual damages of $21,000 and Count II sought punitive damages of $100,000 (see Appendix A).

Summons was served on the registered agent of the defendant in Missouri on March 16, 1973 and no answer or other responsive pleading was filed, and on June 12, 1973, an interlocutory decree of default was entered and an inquiry into damages was set for June 28, 1973. Defendant received no notice that the interlocutory decree had been entered or the setting of the hear-

ing on damages. The defendant was not represented at that hearing.

At the evidentiary hearing of June 28, 1973, the plaintiff testified that he had been employed by ITT for about three and one-half years pursuant to a written agreement and that he was terminated in violation of the provisions of that agreement. He then testified to out-of-pocket damages in excess of $21,000 which included relocation expenses for a job he obtained in Birmingham, Alabama, lost wages between that job and a job he subsequently obtained in Arkansas, that he lost the job in Alabama because of interference by ITT, relocation expenses from Alabama to Arkansas, and other various miscellaneous expenses in selling his home in St. Louis and relocating on those two occasions:

The Missouri Service Letter Statute (§ 290.140, Mo. Rev. Stat., 1969) provides:

> "Whenever any employee of any corporation doing business in this state shall be discharged or voluntarily quit the service of such corporation, it shall be the duty of the superintendent or manager of said corporation, upon the written request of such employee to him, if such employee shall have been in the service of said corporation for a period of at least ninety days, to issue to such employee a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employee to such corporation and the duration thereof, and truly stating for what cause, if any, such employee has quit such service; and if any such superintendent or manager shall fail or refuse to issue such letter to such employee when so requested by such employee, such superintendent or manager shall be deemed guilty of a misdemeanor, and shall be punished by a fine in any sum not exceeding five hundred dollars, or by imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment."

The Petition filed in the action did not charge any cause of action for wrongful breach of the contract of employment or for any interference with subsequent employment. Clearly, as a matter of law, those causes of action were not within the purview of the Petition. The Petition was never amended.

Subsequent to the damage hearing and at the request of the judge during the damage hearing, the plaintiff filed a Memorandum with the court, and failed to send any copy of that Memorandum to the defendant. That Memorandum (Appendix D, Exhibit A) sought entry of the judgment on claims not within the purview of the cause of action set forth in the Petition served on ITT.

On September 28, 1973, the defendant still remaining in default, the court entered a judgment in the amount of $96,000 plus costs (Appendix B).

The defendant filed its Motion to Set Aside Judgment and Petition for Review (Appendix C) and subsequently filed a First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review (Appendix D). A hearing was held on February 7, 1974 at which Robert Bucci, an attorney for ITT, testified that he was the attorney handling the matter and that he had not been advised that an interlocutory decree of default had been entered or that a hearing had been set on damages until he received the notification that the September 28, 1973 judgment had been entered—after its entry.

On February 20, 1974, Judge Buder entered an order overruling and denying the First Amended Motion to Set Aside Judgment, etc. (Appendix E). Defendant filed its Notice of Appeal to the Missouri Supreme Court, asserting that the appeal involved constitutional issues (Appendix F), but that court rejected the assertion that constitutional questions were involved and remanded the appeal to the Missouri Court of Appeals, St. Louis District (Appendix G). ITT filed its Brief and the section

of that Brief setting forth the "Points Relied On" is set out in Appendix M.

On August 5, 1975, the Missouri Court of Appeals, St. Louis District, rendered an opinion (Appendix H) affirming the February 20, 1974 order (Appendix E). In doing so, it failed to consider the points raised in the appellant's Brief under Sections I, II and III and let the circuit court's ruling stand that:

> "The other irregularity upon which defendant relies relates to evidence introduced at trial. Defendant contends that testimony on issues other than one for service letter was adduced at trial and considered by the Court. It is claimed that such evidence exceeds the range of plaintiff's petition and is broader in scope. It appears that such irregularities, if any there be, do not constitute the type or class contemplated by the authorities. Korn v. Ray, 434 S.W.2d 798." (Appendix E).

ITT then filed a Motion for Rehearing which is set forth in Appendix I pointing out, among other things, that the court had failed to consider the constitutional issues raised. That Motion was summarily denied (Appendix J). Within the time prescribed by the Missouri Supreme Court Rules, the defendant-appellant then filed an application for transfer of the appeal to the Missouri Supreme Court (Appendix K) pointing out again that the court had failed to consider the constitutional argument and this was summarily denied on November 10, 1975 (Appendix L). Defendant has proceeded within the time prescribed to file this petition for a writ of certiorari.

Under Article 5, § 3 of the Constitution of the State of Missouri, the Missouri Court of Appeals is the highest Court of the State of Missouri to which the appellant could have recourse unless an application for transfer were granted and said application was in fact denied. Accordingly, the decision of the Missouri Court of Appeals constitutes a decision of the highest court for purposes of 28 USC § 1257(3).

REASONS FOR GRANTING THE WRIT

This court should grant a writ of certiorari and review the decision of the Missouri Court of Appeals, St. Louis District, because that decision affirmed the circuit court's holding that the denial of due process present in this case did not constitute legal grounds for relief from the judgment and this case evidences a substantial deprivation of procedural due process of law required by Amendment 14 to the United States Constitution.

The default judgment entered on September 28, 1973 was entered in violation of the defendant's rights to due process of law under the Fourteenth Amendment to the Constitution of the United States of America in that it was entered on causes of action not within the purview of the pleadings and therefore the defendant had neither notice nor opportunity to be heard on those claims. The Missouri Supreme Court's initial refusal to take jurisdiction of the appeal and its later refusal to grant the defendant's application to transfer the appeal after the adverse decision of the Missouri Court of Appeals, St. Louis District, was a refusal to consider the constitutional issues raised. Likewise, the Missouri Court of Appeals refused to consider the constitutional issues raised in the appellant's Brief (see Appendix M and H) and therefore the decision of the St. Louis Circuit Court that the irregularities asserted, including the failure to give notice of the claims upon which judgment was ultimately granted, did not constitute any grounds for relief from the judgment (Appendix E), stands affirmed. Thus, the defendant's rights under the United States Constitution have been abridged and this is the substantial issue upon which this court is asked to grant its writ of certiorari and hear this matter.

Clearly, the failure to accord a defendant procedural due process of law in entering the judgment is grounds for the grant-

ing of a petition for a writ of certiorari to this court. See *Buchalter v. New York*, 319 U.S. 427 (1943).

The Missouri Service Letter Statute (§ 290.140, Missouri Revised Statutes) provides that wherever any employee of any corporation doing business in the State of Missouri is discharged or quits then it is the duty of the superintendent or manager of the corporation upon the written request of the employee to provide him with a letter setting forth certain information. The failure to provide such a letter, upon a proper request, gives rise to an award of actual damages which must be founded on a refusal of employment based on failure to have the service letter. *Johnson v. American Mutual Liability Insurance Co.*. 335 F. Supp. 390 (W.D.Mo., 1971) and absent such proof only nominal damages may be recovered. *Booth v. Quality Dairy Co.*, 393 S.W.2d 845(2) (St.L.Ct.App., 1952). ITT is an international corporation incorporated in the State of Delaware and the plaintiff in this case was employed by a division of ITT located in Connecticut. He had, however, been employed by ITT for approximately three and one-half years and was working in the St. Louis area. He was discharged by ITT on or about January 2, 1973, and sent a written request for a service letter to his supervisor in Southfield, Michigan, which was delivered about January 10, 1973. He requested a letter "setting forth the nature of my employment, the date of my employment, and the cause of my discharge." There was no reference to the Missouri Service Letter Statute in the request.

The Petition which was filed in the action and was served on March 14, 1973, specifically alleges a violation of the service letter statute and specifically states that the damages result from the plaintiff's inability to secure similar employment as a result of not having such a letter and from mental distress and mental suffering occasioned by the failure to receive such a letter. (See Appendix A).

The principle is well established that a judgment based on issues not raised by the pleadings is *coram non judice* and *void*. This court early recognized that principle in *Reynolds v. Stockton*, 140 U.S. 254 (1891). This court stated there that:

> "But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is, that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings."
>
> (loc. cit. 270).

In the instant case, the plaintiff failed to prove any loss of employment opportunity based upon a failure to provide a service letter. Instead, his evidence showed that the plaintiff had been discharged in violation of the written employment contract between the plaintiff and defendant and had then incurred substantial relocation expenses in moving to his new job in Alabama. The law in Missouri is abundantly clear that wrongful discharge is not part of a claim for breach of the service letter statute. *Woods v. Kansas City Club*, 386 S.W.2d (Mo.Supp., 1964), and *Roberts v. Emerson Electric Mfg. Co.*, 338 S.W.2d 62 (Mo.Supp. 1960). That cause of action was not pleaded in the plaintiff's Petition (Appendix A) and as a matter of law is not within the purview of the pleading, and defendant had no notice and opportunity to respond to that belatedly asserted cause of action because it was not advised that the interlocutory decree of default had been entered and that a damage hearing had been set and was subsequently held on June 28, 1974.

A substantial portion of the other actual damages awarded was based upon an alleged interference with the plaintiff's Alabama employment by the defendant allegedly sending a document to that employer stating that employees of ITT should

not be hired by its distributors. It should be noted that there was no allegation of wrongful interference with subsequent employment, conspiracy or black-listing in the Petition filed and they are not within the purview of the cause of action pleaded. Accordingly, defendant had no notice or opportunity to be heard on this belatedly asserted cause of action and a judgment premised upon such a cause of action is void. See *Reynolds v. Stockton, supra.*

Both the unpleaded claim of wrongful discharge and the claim of wrongful interference with subsequent employment were specifically stressed in the Memorandum filed by the plaintiff (Appendix D, Exhibit A). This Memorandum was filed without any notice to the defendant and defendant never received a copy of said Memorandum prior to the September 28, 1973 entry of judgment against it.

Clearly, defendant was in default on the petition filed and the Court had the power and authority to enter a judgment on the cause of action pleaded in the absence of the defendant's appearing to defend and such an action would not have abridged or violated any title, right, privilege or immunity which the defendant has under the Constitution of the United States. However, the entry of a judgment on causes of action which are not pleaded and on which the defendant had no notice does abridge the rights of the defendant under the Fourteenth Amendment to the Constitution, specifically the right to due process of law which includes the prerequisites of notice and an opportunity to be heard before entry of any judgment. *Boddie v. State of Connecticut,* 401 U.S. 371 (1971). The failure to give notice of the evidentiary hearing and the assertion at that evidentiary hearing, and in the Memorandum filed in the court by the plaintiff, of causes of action not pleaded without giving the defendant any notice of those causes of action or any opportunity to either appear at the evidentiary hearing or to file a Memorandum in opposition to the Memorandum filed

constitutes a deprivation of due process of law and the action of the Circuit Court of the City of St. Louis in concluding that these failures to observe the fundamental prerequisites of due process of law do not constitute a ground for setting aside the judgment is a complete emasculation of the rights established by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for Writ of Certiorari should be granted.

Respectfully submitted

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Attorneys for Petitioner

Of Counsel:

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APPENDIX

APPENDIX A

In the Circuit Court of the City of St. Louis
State of Missouri

Lester L. Fulton, Plaintiff, vs. International Telephone and Telegraph Corporation, Serve Registered Agent: C T Corporation System 314 North Broadway St. Louis, Missouri Defendant.	No. 36962-F. Div. 1.

PETITION

Count I

Comes now plaintiff and pursuant to Section 290.140 R.S. Mo., for his cause of action, states:

1. That defendant is now and was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Delaware; that said corporation has been and at all times herein mentioned is qualified to do business in the State of Missouri with a registered office at 314 North Broadway, St. Louis, Missouri.

2. That on or about the 3rd day of January, 1973 and for approximately 2½ years prior thereto, plaintiff was in the em-

ploy of defendant as a "Supervisor Installation, Maintenance and Tests"; that on said date he was fired effective immediately.

3. That on or about the 8th day of January, 1973 plaintiff duly requested defendant to issue him a service letter, all in accordance with Section 290.140 R.S.Mo. and the defendant has refused to issue such letter to plaintiff in direct violation of said statute, and in direction violation of plaintiff's civil rights.

4. Plaintiff further states that because of said refusal to issue to him a service letter as per the aforesaid statute, he has been and in the future will be unable to secure similar type employment, all to his damage in the approximate amount of $20,000.00 and, further, said plaintiff was caused to endure and will in the future endure and suffer from mental distress and mental suffering, all to plaintiff's damage in the sum of $1,000.00.

Wherefore, plaintiff prays judgment against defendant under Count I of his petition for the sum of Twenty-One Thousand Dollars ($21,000.00) and for his costs herein expended.

Count II

1. Plaintiff adopts and incorporates by reference Paragraphs 1, 2, 3 and 4 of Count I of his petition.

2. Plaintiff states that the aforesaid refusal of said defendant was intentional and without reasonable cause or excuse and was therefore willful, wanton and malicious.

3. Plaintiff further states that said refusal was due to actual malice on the part of defendant in this that said refusal was intentional and due to spite and ill will on the part of defendant, its agents and servants.

4. That by reason of the aforesaid malice on the part of said defendant, its agents and servants, said plaintiff ought to have and recover of said defendant a further sum of $100,000.00 as punitive damages in the premises.

Wherefore, plaintiff prays judgment against defendant under Count II of his petition for the sum of One Hundred Thousand Dollars ($100,000.00) and for his costs herein expended.

AUBUCHON & LAVIN
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APPENDIX B

In the Circuit Court, City of St. Louis
Lester L. Fulton

vs.

International Telephone and Telegraph Corporation

No. 36962F Room 1 September 28, 1973

MEMORANDUM FOR CLERK

Cause called. Plaintiff appears. Although called thrice, defendant appears not and remains in default.

Upon testimony and evidence previously heard, adduced and taken as submitted, judgment and finding in favor of Plaintiff on Count I in the sum of $21,000.00 and costs. Judgment and finding of Court in favor of Plaintiff on Count II in the sum of $75,000.00 as punitive damages.

MICHAEL J. SCOTT, Judge

APPENDIX C

State of Missouri }
City of St. Louis } ss

In the Circuit Court of the City of St. Louis, Missouri

Lester L. Fulton,
Plaintiff,
vs.
International Telephone and Telegraph Corporation,
Defendant.

No. 36962
Division 1

MOTION TO SET ASIDE JUDGMENT
AND PETITION FOR REVIEW

Comes now Defendant International Telephone and Telegraph Corporation and for its motion to set aside the judgment entered in this cause against it and for its Petition for Review of said judgment states:

1. The petition in this case was filed on or about March 14, 1973. Thereafter on June 13, 1973, an interlocutory judgment in default (a default and inquiry) was entered, and on June 28, 1973, a hearing on said default and inquiry was held before the Honorable Michael J. Scott. On August 2, 1973, at the direction of the Court, Plaintiff filed a Memorandum setting forth his asserted basis for securing the judgment for substantial, actual and punitive damages, said Memorandum is marked Exhibit A and appended hereto. That judgment was subsequently entered against defendant for $21,000 actual and $75,000 punitive damages and costs on September 28. 1973, making a total judgment against defendant for $96,000 and costs.

2. Petitioner for its cause for vacating said judgment states that, as more particularly set forth below, said damages were assessed on causes of action not pleaded in the Plaintiff's Petition, that no amended pleading was served upon it setting forth the claims or causes of action which are the basis of the judgment, that the judgment entered violates due process of law requirements of the Constitution of the United States of America and the Constitution of the State of Missouri, that acts of the plaintiff and his failure to disclose pendency of the default proceeding deprived defendant of due process of law, that there has been a failure to comply with Missouri Statutes and the Rules of Civil Procedure and that certain material facts in the Plaintiff's Petition were untrue and defendant has now and then had a good defense thereto.

3. The judgment entered on September 28, 1973, is based on claims or causes of action not within the purview of the Plaintiff's Petition. Said claims or causes of action on which plaintiff requested and secured entry of this judgment, are set forth in Exhibit 1, all of which are outside the purview of his plea for damages for violation of the Service Letter Statute (§290.140, Revised Statutes, Missouri, 1971) include:

> "The Court should further consider in this regard Defendant's announcement of March 13, 1973 to its distributors that no ex-employees of defendant should be employed by the said distributors which, of course, was a pistol-point arrangement that penalties would immediately follow if such an edict was carried out by its distribtuors and eventually lead to the severance of plaintiff from his then present employment with Telephone Service Company of America in Birmingham, Alabama." (Paragraph 10 of Plaintiff's Memorandum)
>
> • • • • • • •
>
> "[P]laintiff did sever his relations with Pacific Telephone Company where he had been employed for fourteen years

> and eight months consecutively before resigning from that job to accept employment with defendant. Severance of that employment also meant forfeiture of certain benefits which would have been flowing to him if his tenure with that company had not ceased, but as a result of his employment and being lured to ITT he has now forfeited beyond recall vested rights consisting of retirement payments to be attained on his 62nd birthday; insurance benefits of life and health, not only for himself but his wife and family; and the normal increase in his salary from Pacific Telephone Company." (page 4 of Plaintiff's Memorandum)

Actual damages of $21,000 were assessed on the foregoing claims with no instance cited in Exhibit 1 that he had been denied employment as a result of failure to provide a service letter, which is the only grounds for assertion of actual damages. The actual and punitive damages were therefore being assessed on grounds not properly within the purview of the petition served upon the defendant. The foregoing quoted portions of Exhibit A clearly show that plaintiff was asserting causes of action for blacklisting, interference with contractual relations. conspiracy, for fraudulently inducing an employee to enter employment with ITT etc., none of which were pleaded.

The award of the damages therefore on causes of action not pleaded is coram non judice, violates the due process requirements of the Fourteenth Amendment to the United States Constitution and Article 1, Section 10 of the Constitution of the State of Missouri, in that defendant had no notice of the claims asserted in Exhibit A and is contrary to the requirements of Missouri law, Statutes, and Court Rules requiring service of amended pleadings on defendants in default.

4. Defendant was deprived of due process of law in violation of the Fourteenth Amendment to the Constitution of the

United States of America and Article I, section 10 of the Constitution of the State of Missouri as to both the initial entry of default and the assessment of damages in that:

(a) Defendant reasonably believed that the action threatened in the certified letter dated June 5, 1973 (marked Exhibit 4 at the June 28, 1973 hearing), had been withdrawn on the basis of subsequent correspondence, marked Exhibits B and C (appended hereto and incorporated herein by reference). In Exhibit C, responding to Exhibit B, attorneys for plaintiff failed to advise the defendant of the actual entry of the interlocutory decree of June 13, the proceedings of June 28, to assess the substantial damages, and/or the impending submission of the Memorandum (Exhibit A) which he ultimately submitted on August 2, 1973, to this Court, thus failing to give an opportunity to Defendant to respond thereto. In fact no copy of the Memorandum was ever sent to defendant.

(b) Exhibit C induced the defendant to reasonably believe that no action would be taken without some further warning or advice and until some further negotiations had occurred between the parties and effectively kept it from inquiring into the status of the case. Said response amounted to a tacit assurance that no proceedings to enter judgment were pending.

(c) In its Memorandum on August 2, 1973 (Exhibit A), plaintiff's attorney failed to advise the Court of defendant's inquiry (Exhibit B) or his response (Exhibit C) but instead stressed that there had been no response as of the date of the hearing to the June 5, 1973 letter (paragraphs 5 and 6 of Plaintiff's Memorandum), which amounted to a concealment from the Court of the defendant's inquiry and an implicit representation that defendant had made no response to the June 5 letter. As an officer of the Court, plaintiff's attorney had the duty to advise the Court that

the defendant had inquired into the status of the case after the hearing and before the assessment of damages. It is submitted that the Court would not have entered the judgment of September 28, 1973, if it had been aware of the correspondence set forth in Exhibits B and C.

(d) Defendant first received notice that the judgment was to be entered on October 1, 1973, a copy of which is marked Exhibit D (appended hereto and incorporated herein by reference). Although the Court apparently intended to give defendant a warning before entry of the final judgment by sending a copy of proposed judgment, that notice was not mailed until the afternoon of September 26. The envelope in which said notice was mailed to defendant is marked Exhibit E (appended hereto and incorporated herein by reference). The entry of judgment, marked Exhibit E (appended hereto and incorporated herein by reference) was received on October 2, 1973.

(e) The Circuit Court Clerk did not comply with the requirements of Rule 74.78, Missouri Rules of Civil Procedure.

5. Defendant-petitioner further states that the Plaintiff's Petition is untrue in various material matters in that:

(a) the absence of a service letter did not preclude plaintiff from securing "similar type employment" to that he had with defendant, prior to the filing of his Petition, in fact on defendant's recommendation the plaintiff secured similar employment within three weeks;

(b) the absence of a service letter did not preclude plaintiff from obtaining "similar type employment," to that he had with defendant, after filing his Petition, in fact he was employed in the same type business for Stanley Communications Company, Inc.;

(c) plaintiff did not sustain damages in the amount of $20,000 as a result of the alleged inability to secure said "similar type employment," and

(d) the absence of a service letter was not due to actual malice, spite, ill will, and was not willful, wanton and malicious. In fact, as set forth in (a) above, defendant assisted him in obtaining employment.

6. Further, defendant has a defense to the cause of action pleaded in Plaintiff's Petition for the reason that the Missouri Service Letter Statute is inapplicable because:

(a) the contract of employment (Plaintiff's Exhibit 6) by which plaintiff entered defendant's employ was not made in Missouri;

(b) plaintiff was a resident of California when initially employed by defendant;

(c) Exhibit 6 paragraph 13 indicates the parties at the time of executing Exhibit 6 intended New York law to govern their relationship;

(d) defendant is a Delaware corporation;

(e) the purported request for a service letter (Plaintiff's Exhibit 8) was delivered in Michigan.

Wherefore, Plaintiff prays the Court:

(1) Enter an Order staying execution of the judgment entered on September 28, 1973, pending the final decision of this Motion and Petition;

(2) that the Court declare its said judgment null and void and of no force and effect;

(3) that the Court grant Plaintiff's Motion and Petition for Review and set aside the judgment entered in this cause against Defendant.

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State of Missouri }
City of St. Louis } ss.

James W. Herron being first duly sworn does depose and state that the facts as stated in the above Motion to Set Aside Judgment and Petition for Review are true to the best of his knowledge, information and belief.

JAMES W. HERRON

Subscribed and sworn to before me this Fourteenth day of November, 1973.

DOLORES V. EXLER
Notary Public

My Commission expires: April 10, 1976.

State of Missouri }
City of St. Louis } ss.

Robert A. Bucci being first duly sworn does depose and state that the facts as stated in the above Motion to Set Aside Judgment and Petition for Review are true to the best of his knowledge, information and belief.

ROBERT A. BUCCI

Subscribed and sworn to before me this Fourteenth day of November, 1973.

DOLORES V. EXLER
Notary Public

My commission expires: April 10, 1976.

APPENDIX D

FIRST AMENDED MOTION TO SET ASIDE JUDGMENT AND TO QUASH EXECUTION, AND PETITION FOR REVIEW

"Comes now Defendant International Telephone and Telegraph Corporation and for its First Amended Motion to Set Aside the Judgment entered in this cause against it to Quash Execution thereon and for its First Amended Petition for Review of said judgment states:

"1. The petition in this case was filed on or about March 14, 1973. Thereafter on June 13, 1973, an interlocutory judgment in default (a default and inquiry) was entered, and on June 28, a hearing on said default and inquiry was held before the Honorable Michael J. Scott. At the direction of the Court, plaintiff, filed a memorandum setting forth his asserted factual basis for securing the judgment for substantial, actual and punitive damages, said Memorandum is marked Exhibit A and appended hereto. That judgment was subsequently entered against defendant for $21,000 actual and $75,000 punitive damages and costs on September 28, 1973, making a total judgment against defendant for $96,000 and costs.

"2. Petitioner for its grounds for vacating and setting aside said judgment, and permanently quashing execution thereon states that, as more particularly set forth below, said damages were assessed on causes of action not pleaded in the Plaintiff's Petition, that no amended pleading was served upon it setting forth the claims or causes of action which are the basis of the judgment, that the judgment entered violates due process of law requirements of the constitution of the United States of America and the Constitution of the State of Missouri, that acts of the plaintiff and his failure to disclose pendency of the default

proceeding deprived defendant of due process of law, that other damages than those pleaded in plaintiff's petition were assessed, that plaintiff secured said judgment on the basis of false and misleading testimony, that plaintiff failed to disclose certain crucial facts to the Court, which would, if known to the Court, have caused the Court to refuse to enter the judgment; that there has been a failure to comply with Missouri Statutes and the Rules of Civil Procedure; that the Court lacked jurisdiction to enter the judgment that the evidence introduced by plaintiff at the July 28 hearing established that he had, as a matter of law, no claim for relief under the Missouri Service Letter Statute and that certain material facts in the Plaintiff's Petition were untrue and defendant has now and then had a good defense thereto.

"3. As a matter of law, plaintiff failed to establish that he lost any prospective employment, or the amount he would have made in any prospective employment, so there is no basis for awarding the substantial actual compensatory damages of $21,000.

"4. The judgment entered on September 28, 1973, is based on claims or causes of action not within the purview of the Plaintiff's Petition, and the actual and punitive damages assessed are therefore damages other than those pleaded. Said damages and the claims or causes of action on which plaintiff sought, requested and secured entry of this judgment, which are outside the purview of his plea for damages for violation of the Service Letter Statute (§ 290.140, Revised Statutes, Missouri, 1971) include:

"(a) Plaintiff introduced the contract of employment marked Plaintiff's Exhibit 6 at the evidentiary hearing of June 28, 1973, and testified that his termination of employment with defendant violated that contract. No claim or cause of action for wrongful discharge or breach of contract had been pleaded and wrongful discharge or

breach of a contract of employment are not within the purview of the Plaintiff's pleaded claim.

"(b) Although he introduced no evidence to show he lost a prospective employment in the St. Louis area as a result of failing to have a service letter, he sought and obtained entry of actual damages for:

"(1) Travel between Birmingham, Alabama and St. Louis, $702 (Transcript 44);

"(2) Air fare on weekends from Little Rock to St. Louis, $952.00 (Transcript 43);

"(3) Twenty-three weeks living expenses away from St. Louis at $26.00 a day, five days per week, $2,990.00 (Transcript 44);

"(4) Four trips to Little Rock by wife for house hunting purposes, $272 with living expenses for nine days at $14.00 a day, $126.00 (Transcript 44);

"(5) Telephone calls for income tax and family problems, $493.00 (Transcript 45-6);

"(6) Moving household goods, $1,592.00 (Transcript 46);

"(7) Travel expenses to move his family to Little Rock, $163.00 (Transcript 46);

"(8) Loss on the sale of his home in St. Louis (Transcript 44) including penalties and real estate commissions (Transcript 45) and closing costs on a home in Little Rock (Transcript 46) which along with a claimed $2,000 loss of income (Transcript 43) evidently made up the remainder of his claimed total actual damages of $27,065.00 (Transcript 46-7).

(c) Although the request for a service letter was not mailed until January 8, 1973 (Transcript 39-40) and defendant received it on the 10th (Transcript 40) and had

a reasonable time to respond, the plaintiff sought and obtained entry of damages of $400 a week for all three weeks he claims he was unemployed in January, 1973.

(d) Although there was no evidence to sustain a finding that his claimed two weeks unemployment between his employment in Birmingham, Alabama, and Little Rock, Arkansas, was in any way connected to failure * * * plaintiff sought and secured entry of $400 a week damages for a total $800 damages for this period as part of the $21,000 actual damages awarded.

(e) Plaintiff sought and obtained entry of judgment for substantial actual and punitive damages at the June 28 evidentiary hearing, on grounds of the mailing of the document marked Plaintiff's Exhibit 7 which he testified caused him to leave his employment in Birmingham, Ala. (Transcript 34-9). Said alleged interference with his subsequent employment is not properly a part of the claim pleaded in his petition and any alleged damages caused by said document are not within the purview of the claim for breach of the Service Letter Statute.

(f) In response to the Court's directive at the June 28 hearing to Plaintiff's counsel to file a Memorandum "paying particular attention to . . . a summary of the factual situation that's the basis of the request for recovery" (Transcript page 48), the plaintiff urged entry of substantial actual and punitive damages of the following matters not properly within the purview of his plea for damages for violation of the Service Letter Statute.

> "(1) "The Court should further consider in this regard Defendant's announcement of March 31, 1973 to its distributors that no ex-employees of defendant should be employed by the said distributors which, of course, was a pistol-point arrangement that penalties

> would immediately follow if such an edict was carried out by its distributors and eventually lead to the severance of plaintiff from his then present employment with Telephone Service Company of America in Birmingham, Alabama."

(Paragraph 10 of Plaintiff's Memorandum)

> (2) (P)laintiff did sever his relation with Pacific Telephone Company where he had been employed for fourteen years and eight months consecutively before resigning from that job to accept employment with defendant. Severance of that employment also meant forfeiture of certain benefits which would have been flowing to him if his tenure with that company had not ceased, but as a result of his employment and being lured to ITT he has now forfeited beyond recall vested rights consisting of retirement payments to be attained on his 62nd birthday; insurance benefits of life and health, not only for himself but his wife and and family; and the normal increase in his salary from Pacific Telephone Company." (page 4 of Plaintiff's Memorandum)

"On the basis of the foregoing, actual damages of $21,000 were assessed with no instance cited in Exhibit A or no proof in the transcript of the hearing of June 28 that Plaintiff had been denied employment as a result of failure to provide a service letter, on the date said employment would have begun or the amount plaintiff would have been paid all of which must necessarily be shown to recover substantial actual compensatory damages, or the location of any lost employment or the amount he would have received in any such employment. The actual and punitive damages were therefore being assessed on grounds not properly within the purview of the petition served upon the defendant. The foregoing quoted portions of Exhibit A and the

transcript clearly show that plaintiff was asserting and took judgment on claims for breach of contract, wrongful discharge, blacklisting, interference with contractual relations, conspiracy, for fraudulently inducing an employee to enter employment with ITT etc., none of which were pleaded. This Court therefore had no power or jurisdiction to enter a judgment on these unpleaded claims.

"This court lacked jurisdiction to award damages on causes of action not pleaded and the award of said damages is coram non judice, and is void, the judgment violates the due process requirements of the Fourteenth Amendment to the United States Constitution and Article 1, Section 10 of the Constitution of the State of Missouri, in that defendant had no notice of the claim not asserted in the pleadings and is contrary to the requirements of Missouri law, Statutes, and Court Rules requiring service of amended pleadings on Defendants in default.

"5. Defendant was deprived of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 10 of the Constitution of the State of Missouri as to both the initial entry of default and the assessment of damages in that:

> "(a) Defendant reasonably believed that the action threatened in the certified letter dated June 5, 1973 (marked Exhibit 4 at the June 28, 1973 hearing) had been withdrawn on the basis of subsequent correspondence, marked Exhibits B and C (appended hereto and incorporated herein by reference). In Exhibit C, responding to Exhibit B, attorneys for plaintiff failed to advise the defendant of the actual entry of the interlocutory decree of June 13, the proceedings of June 28, to assess the substantial damages, and/or the submission or impending submission of the Memorandum (Exhibit A) submitted by plaintiff

to this Court, thus failing to give an opportunity to Defendant to respond thereto. In fact no copy of the Memorandum was ever sent to defendant.

"(b) Exhibit C induced the defendant to reasonably believe that no action would be taken without some further warning or advice and until some further negotiations had occurred between the parties and effectively kept it from inquiring into the status of the case. Said response amounted to a tacit assurance that no proceedings to enter judgment were pending.

"(c) As an officer of the Court, plaintiff's attorney had the duty to advise the Court that the defendant had inquired into the status of the case after the hearing and before the assessment of damages. It is submitted that the Court would not have entered the judgment of September 28, 1973, if it had been aware of the correspondence set forth in Exhibits B and C.

"(d) Defendant first received notice that the judgment was to be entered on October 1, 1973, a copy of which is marked Exhibit D (appended hereto and incorporated herein by reference). Although the Court apparently intended to give defendant a warning before entry of the final judgment by sending a copy of proposed judgment, that notice was not mailed until the afternoon of September 26. The envelope in which said notice was mailed to defendant is marked Exhibit E (appended hereto and incorporated herein by reference). The entry of judgment, marked Exhibit E (appended hereto and incorporated herein by reference) was received on October 2, 1973.

"(e) The Circuit Court Clerk did not comply with the requirements of Rule 74.78, Missouri Rule of Civil Procedure.

"6. Plaintiff perpetrated a fraud upon the Court and thereby induced it to enter the judgment of September 28, 1973, in that he (1) testified falsely at the evidentiary hearing of June 28, 1973, and (2) failed to advise the Court of crucial facts which, if they had been brought to the attention of the Court, would have caused this Court to decline to enter the judgment it entered herein, which testimony and facts included:

> "(a) Plaintiff failed to tell the Court that he had been in contact in January, 1973, with an employee of defendant named Maurice Lynch who was instrumental in obtaining, and recommended him for, employment by Telephone Service Company in Birmingham, Alabama. Plaintiff was in that employment from on or about January 22, 1973 to on or about March 25, 1973.

"Therefore, plaintiff did not tell the truth when he testified that the only persons from ITT with whom he had been in contact since his meeting with Walter Pepple on January 4, were Floyd C. Miller (Transcript 28-9) and Monty Russell (Transcript 30-32), as his contact with Maurice Lynch, which lead to his employment occurred after that date.

"(b) Plaintiff's testimony was not true when he represented to the Court that Plaintiff's Exhibit No. 6, an employment contract, was in force and effect at the time of termination of his employment with defendant. He failed to advise the court that that contract had been terminated in writing as provided by Exhibit No. 6 on or about July 5, 1973. On pages 18 through 22, of the transcript of the evidentiary hearing of June 28, 1973, the plaintiff discussed the contract and stressed that he was not terminated in conformance with its provisions.

"(c) certain of Plaintiff's testimony concerning expenses he had incurred was not true in that he testified his living expenses for the 26 week period from the date of his termination with ITT until the hearing were $26.00 a day, five days a week and that:

> "Q. You've not been compensated for this?
>
> "A. No, sir." (Transcript 44).

In fact that testimony was false as plaintiff received compensation of $23.00 a day, five days a week for living expenses in his job with Telephone Service Company for some or all of the period of his employment, which lasted from on or about January 22, 1973 to on or about March 25, 1973.

> "(d) Plaintiff's testimony was untrue when he testified that until the date he received Plaintiff's Exhibit 7 he was planning to move his family to Birmingham, Alabama (Transcript 37), as on the basis of a document authored by plaintiff, it is clear that plaintiff had already decided to take a position with Stanley Communications Company in Little Rock, Arkansas.

"(e) Plaintiff's testimony was untrue when he testified that Telephone Service Company reneged on its alleged agreement to pay his moving expenses for his family from St. Louis to Birmingham, Alabama, and that it reneged because of its receipt of Exhibit 7 (Transcript 37-39). In fact, Telephone Service Company did not renege on paying moving expenses, and Exhibit 7 played no part in any decision it made concerning plaintiff.

"(f) Plaintiff's testimony was untrue and misleading when he stated that Stanley Communications Company, the company by which he was employed at the time of the June 28, 1973 hearing, was not in the 'telephone business.' (Transcript 35, 43) In fact he was hired by

Stanley Communications to obtain telephone interconnect business, the very field that he had been working in for ITT (Transcript 16-7) and for Telephone Service Company.

"(g) Plaintiff's testimony was false when he stated that Stanley Communications Company, the company by which he was employed at the time of the June 28, 1973 hearing, had requested a letter concerning his services with ITT. (Transcript 42). In fact, no such letter had been requested.

"(h) Plaintiff's testimony that there was a two week gap between his termination with the Telephone Service Company of Birmingham and his beginning employment with Stanley Communications in Little Rock (Transcript 34-5) was false and misleading. There was a one week gap and plaintiff failed to advise the Court that he had the job in Little Rock at the time that he voluntarily terminated from the Telephone Service Company job in Birmingham and that it was his decision to have any gap that occurred between the jobs.

"7. Defendant-petitioner further states that the Plaintiff's Petition is untrue in various material matters in that:

"(a) the absence of a service letter did not preclude plaintiff from securing 'similar type employment' to that he had with defendant, prior to the filing of his petition, in fact on defendant's recommendation the plaintiff secured similar employment at a higher pay than with defendant, within three weeks;

"(b) the absence of a service letter did not preclude plaintiff from obtaining 'similar type employment,' to that he had with defendant, after filing his Petition, in fact he was employed in the same type business for Stanley Communications Company, Inc., at a higher pay rate than when he was with defendant;

"(c) plaintiff did not sustain damages in the amount of $21,000 as a result of the alleged inability to secure said 'similar type employment,' and

"(d) the absence of a service letter was not due to actual malice, spite, ill will, and was not wilful, wanton and malicious. In fact, as set forth in (a) above, defendant assisted plaintiff in obtaining similar employment.

"8. Further, testimony of the plaintiff and exhibits introduced by him at the June 28 hearing established that plaintiff has, as a matter of law, no cause of action for violation of the Service Letter Statute and that defendant therefore, has a defense to the cause of action pleaded in Plaintiff's Petition for the reason that:

"(a) the contract of employment (Plaintiff's Exhibit 6) by which plaintiff entered defendant's employ was not made in Missouri;

(b) plaintiff was resident of California when initially employed by defendant (Transcript 15-6);

(c) Exhibit 6 paragraph 13 indicates the parties at the time of executing Exhibit 6 intended New York law to govern their relationship;

(d) defendant is a Delaware corporation;

(e) the purported request for a service letter (plaintiff's Exhibit 8) was delivered in Michigan.

Wherefore, Plaintiff prays the Court:

(1) declare its said judgment null and void and of no force and effect;

(2) grant this amended Motion and Petition and set aside the judgment entered in this cause against Defendant;

(3) grant the defendant ten days thereafter to file an answer or other responsive pleading to Plaintiff's Petition;

(4) permanently quash execution on said judgment;

(5) grant such other and further relief as to the Court may seem just and proper."

(The following Verification was filed December 20, 1973 (caption and signatures omitted))

"Verification

James W. Herron being first duly sworn does depose and state that the facts as stated in the foregoing pleading are true to the best of his information and belief.

/s/ JAMES W. HERRON

"Subscribed and sworn to before me this 13th day of December, 1973.

/s/ Dolores V. Exler
Notary Public

(Notary Seal)

My Commission expires: April 10, 1976."

(Whereupon, Proof of Service was filed and is in words and figures as follows: (Caption and signatures omitted)):

"Proof of Service"

"A copy of the foregoing document was hand delivered this 13th day of December, 1973 to the office of the Attorneys for Defendant."

/s/ JAMES W. HERRON

(Whereupon, Exhibit A, was filed with the foregoing document and is in words and figures as follows: (Caption and Signatures omitted)):
"Ex. A.

"Memorandum in Support of Plaintiff's Hearing On Default and Inquiry, June 28, 1973

"In accordance with the Court's direction at the conclusion of plaintiff's evidence in the above matter, we are pleased to submit a memorandum relative to jurisdiction, venue and a summary of the facts.

"1. There could be no question of venue as shown by plaintiff's Exhibit 1, same being abstract of the corporate record of the Secretary of State of Missouri showing that the defendant Delaware corporation was qualified to do business in the State of Missouri on January 22, 1968 having as its registered agent C. T. Corporation System, 314 North Broadway, St. Louis, Missouri and that service was duly obtained thereon in this cause by Sheriff's return as reflected in the Court file on March 16, 1973 after having been filed in the Circuit Clerk's Office of the City of St. Louis, Missouri on March 14, 1973.

"2. During the testimony of Mr. Ross G. Lavin, one of plaintiff's lawyers, evidence was shown to the Court by Plaintiff's Exhibit 2, a copy of Mr. Lavin's letter to a Mr. Robert Bucci, making him aware of the delinquency of defendant in failing to file a responsive pleading to plaintiff's petition.

"3. Confirmation of Mr. Bucci's knowledge of failure to file responsive pleadings was acknowledged by his letter of April 13, 1973 requesting time to employ local counsel to defend this action—See plaintiff's Exhibit 3.

"4. Mr. Lavin further testified to several telephone conversations with the said Mr. Bucci advising Mr. Bucci of defendant's delinquency in failing to file responsive pleading.

"5. Mr. Lavin's certified letter of June 5, 1973 (plaintiff's Exhibit 4) addressed to defendant, attention of Mr. Robert Bucci, advised that unless defendant's appearance was duly entered and/or pleading filed that plaintiff would have no alternative but to put this matter on the default docket. This exhibit was accompanied by plaintiff's Exhibit No. 5, same being return receipt showing acceptance of this letter by defendant on June 7, 1973.

"6. There can be no question here that all precautions were taken by plaintiff to adequately advise and admonish the hereinnamed defendant that plaintiff would be compelled to put this cause on the default docket and no advice was received from the defendant up to the time of hearing on June 28, 1973 of their concern in filing proper pleading to plaintiff's petition. Thus it is clearly shown to the Court that all requirements of action under 290.140 RSMo. have been fully complied with by plaintiff.

"7. Plaintiff, Lester L. Fulton, in the course of his testimony introduced Exhibit No. 7, being letter dated March 13, 1973 from the Director of Marketing of CESD, Division of defendant

ITT, prohibiting distributors such as the one at which plaintiff was employed at the time from hiring former employees of ITT.

"8. Exhibit 8 also produced during the course of plaintiff's testimony and consisting of a request for a service letter as of January 8, 1973, together with Exhibit 9, return receipt showing defendant's acceptance of this request for service letter on January 10, 1973, are all in compliance with the aforesaid statute.

(There is no 9* Supplied by Reporter).

"10. Exhibit No. 10 was properly introduced into evidence during plaintiff's testimony to show the defendant's worth or financial condition, same to be used as a consideration in determining the amount of punitive damages to be awarded. To refresh the Court's memory, the defendant's net worth, as shown by its own last published annual report in 1972, was in the amount of $3,620,061,000.00. Plaintiff's evidence also produced evidence to support his prayer in the amount of $21,-000.00 actual damages.

"As the Court is well aware, the defendant's financial condition is the proper subject for consideration for the purpose of assessing puntive damages. There can be no question that the plaintiff here is entitled to a very substantial award on this Court because of the aggravated circumstances in abundance as shown by plaintiff's evidence. Defendant here has unquestionably embarked on a program of harassment after discharge by the defendant in its failure to provide the service letter as required by statute; its warning by one of its supervisory employees, one Walter J. Pepple, that plaintiff would either sign resignation or 'he would no longer work in this industry.' The Court should further consider in this regard defendant's announcement of March 13, 1973 to its distributors that no ex-employees of defendant should be employed by the said distributors which, of course, was a pistol point arrangement that

penalities would immediately follow if such an edict was carried out by its distribtuors and eventually lead to the severance of plaintiff from his then present employment with Telephone Service Company of America in Birmingham, Alabama.

"The Court should further consider that in plaintiff's attempt to obtain employment following his discharge that he was requested to provide a letter from his immediate past employer which he was unable to do and that this condition exists in his present employment with Stanley Communications, Inc., Little Rock, Arkansas which company is still awaiting such a letter to be provided by plaintiff.

"It is also respectfully submitted to this Court that the plaintiff did sever his relations with Pacific Telephone Company where he had been employed for 14 years and 8 months consecutively before resigning from that job to accept employment with defendant. Severance of that employment also meant forfeiture of certain benefits which would have been flowing to him if his tenure with that company had not ceased, but as a result of his employment and being lured to ITT he has now forfeited beyond recall vested rights consisting of retirement payments to be attained on his 62nd birthday; insurance benefits of life and health, not only for himself but his wife and family; and the normal increase in his salary from Pacific Telephone Company.

Relative to punitive damages, under Missouri law, such damages are allowed in proportion to the degree of malice characterizing the act to the age, sex, health and character of the injured party, the intelligence, standing and *affluence of the tort feasor* and other like circumstances. *Johnson v. American Mutual Insurance Co.*, 335 F. Supp. 390.

The Missouri courts have frequently ruled in those cases involving assessment of punitive damages that the defendant's worth or financial condition is a consideration in determining

the amount of punitive damages to be awarded. This in *Walker v. St. Joseph Belt Railway Co.*, 102 S.W. 2d 718, decided *February 1, 1937*, and being an action for actual and punitive damages for failure to comply with the service letter statute, an award of $5,000.00 to a discharged employee was ruled not excessive upon evidence that corporation had assets in excess of $400,000.00 and other valuable properties. The Court further stated that an ordinary award of punitive damages would have but little deterrent effect upon it. Plaintiff here has deliberately called the Court's attention to this award to illustrate the difference in money value between that year and the present time and to further illustrate the difference in defendant's financial position in that case as compared to the instant case.

"In the Walker case, cited above, the award represented approximately 1¼% of defendant's net worth. The Court's attention is forcefully drawn to present plaintiff's prayer herein for punitive damages in the amount of $100,000.00 which does not closely approximate the 1¼% as awarded in the Walker case which in reality and is an infinitesimal small amount, to wit, .000027 of defendant's net assets.

"In *Potter v. Milbank Manufacturing Co.*, 489 SW 2d 197, the Supreme Court decided on December 11, 1972 an award of $20,000.00 punitive damages on a service letter action was shown as not excessive where defendant's net worth was $2,-396,481.00.

"There is no intention to belabor the Court with further citations of substantial awards. In cases originating in Missouri on Service Letter actions, the trend certainly in recent years had been to liberalize the awards on punitive damages and plaintiff here feels that his prayer of $100,000.00 is indeed in keeping with the norms set out in recent decisions consistent with such decisions and actually is well below the percentages referred to above.

"Due consideration should be given to the 26½ years of consecutive employment in the field of communications which has now been terminated and that he presently is employed in a field in no wise associated with his former endeavor. It is for these reasons that plaintiff respectfully requests the Court for an award as prayed for in both Count I and II of his said petition."

"Ex.B

A Division of International Telephone and
Telegraph Corporation
60 Washington Street
Hartford, Conn. 06105
Phone (203) 549-1800
Telex: 99-366

"June 29, 1973.

"Ross G. Lavin, Esquire
Aubuchon and Lavin
Suite 1314
705 Olive Street,
St. Louis, Missouri, 63101.

"Re: Lester L. Fulton v. ITT

"Dear Mr. Lavin:

"I called your office today but you were out of town. Apologies for the delay in this matter. I will be on vacation July 2 through July 6 but want to discuss settlement of this matter on July 9, when I return.

"If we cannot reach agreement, I have plans to retain Stolar, Heitzmann & Eder of St. Louis to represent ITT."

"Thank you for your courtesy and cooperation in this matter.

Yours very truly
ROBERT A. BUCCI, Attorney."

Exhibit C.

Law Offices
Aubuchon and Lavin
Suite 1314
705 Olive Street
St. Louis, Missouri 63101
Area Code 314 621-1575

July 2, 1973

Received July 6, 1973
R.A. Bucci

ITT Communications Equipment and Systems
60 Washington Street
Hartford Conn. 06106

Attn: Mr. Robert A. Bucci
Attorney

Re: Lester L. Fulton v. ITT

Dear Mr. Bucci:

"I am now handling the above-styled matter.

"This will acknowledge receipt of your letter of June 29, 1973. Please call me upon return to your desk.

"Very truly yours
MICHAEL J. AUBUCHON

Ex.D.

"Memorandum for Clerk

"Cause called. Plaintiff appears. Although called thrice, defendant appears not and remains in default. Upon testimony and evidence previously heard and adduced, the Court will rule as follows on September 28, 1973:

"Judgment and finding of Court in favor of Plaintiff on Count I in the sum of $21,000.00 and costs.

"Judgment and finding of Court in favor of Plaintiff on Count II in the sum of $75,000.00 as punitive damages.

"Filed September 19, 1973.

MICHAEL J. SCOTT, Judge

"Ex. E.

"Post marked"
St. Louis Mo.
26 Sept.
1973.

Michael F. Scott
Judge of the Circuit Court
Twenty-Second Judicial Circuit
St. Louis, Missouri 63101

Mr. Robert A. Bucci
Attorney at Law
60 Washington Street
Hartford, Connecticut 06106

Ex. F.

"Memorandum for Clerk

September 28, 1973

Cause called. Plaintiff appears. Although called thrice, defendant appears not and remains in default.

"Upon testimony and evidence previously heard, adduced and taken as submitted, judgment and finding in favor of Plaintiff on Count I in the sum of $21,000.00 and costs. Judgment and finding of Court in favor of Plaintiff on Court II in sum of $75,000.00 as punitive damages.

MICHAEL J. SCOTT, Judge

APPENDIX E

In the Circuit Court of the City of St. Louis
State of Missouri

Lester L. Fulton,
Plaintiff,
vs.
International Telephone and Telegraph Corporation,
Defendant.

Cause No. 36962-F.
Div. No. 1.

COURT MEMORANDUM OPINION

Plaintiff filed this action against defendant corporation for refusal to furnish a service letter and judgment was granted and entered on September 28, 1973, by default. On November 20, 1973, defendant filed its First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review, and the instant controversy involves the said motion.

Service of process is not challenged and defendant not only had additional notice but also received rather extensive information from plaintiff concerning the pending litigation. The evidence herein indicates that poor office assignment, or improper channeling, by house counsel for defendant actually created the present problem. Diligence on the part of defendant is conspicuous by its absence. Zbryk v. B. F. Goodrich, 344 S.W. 2d 138.

Defendant's current position is directed to two separate grounds or propositions. One is based on the charge of fraud and perjury. There is absolutely no creditable evidence to dem-

onstrate or support such assertion of fraud. While the evidence here presented on behalf of defendant may be contradictory or conflicting with that produced at trial, such circumstance does not warrant a charge of perjury. This court is in no position to weigh the testimony produced at the respective hearing. Head v. Ken Bender, 452 S.W. 2d 596.

The other irregularity upon which defendant relies relates to evidence introduced at trial. Defendant contends that testimony on issues other than one for service letter was adduced at trial and considered by the Court. It is claimed that such evidence exceeds the range of plaintiff's petition and is broader in scope. It appears that such irregularities, if any there be, do not constitute the type or class contemplated by the authorities. Korn v. Ray, 434 S.W. 2d 798.

A ruling on plaintiff's objections is not required because of the conclusion reached by the court in this proceeding.

Defendant's First Amended Motion to Set Aside Judgment, Quash Execution and Petition for Review, overruled and denied.

So ordered.

WILLIAM E. BUDER
Judge

APPENDIX F

"Whereupon, and on March 1, 1974, the following Notice of Appeal to Supreme Court of Missouri was filed, and is in words and figures as follows (Caption and signatures omitted):

"NOTICE OF APPEAL TO SUPREME COURT OF MISSOURI

"Notice is given that defendant, International Telephone and Telegraph Corporation appeals from the appealable order entered in this action on the 20th day of February 1974.

Jurisdiction of the Supreme Court is based on fact that this appeal involves:

(x) Construction of the federal or state Constitution.

/Signed/ JAMES W. HERRON
Attorney for Defendant-
Appellant

Dated March 1, 1974."

APPENDIX G

Clerk of the Supreme Court
State of Missouri
Jefferson City, Missouri
65101

March 18, 1974

Mr. James W. Herron
Lewis, Rice, Tucker, Allen & Chubb
611 Olive Street
St. Louis, Missouri 63101

In re: Fulton v. International Telephone and Telegraph,
No. 58598

Dear Mr. Herron:

This will advise that the Court this day made the following order in the above-entitled cause:

"Cause ordered transferred to Missouri Court of Appeals, St. Louis District, because of lack of jurisdiction in this Court."

The mandate and all files are being mailed this day to said Court of Appeals.

Yours very truly

THOMAS SIMON
Clerk

TFS/vhg

cc: Messrs. Aubuchon and Lavin, 705 Olive, Suite 1314, St. Louis, Mo. 63101

Mrs. Rosa Curson, Clerk, Missouri Court of Appeals, St. Louis District, Civil Courts Bldg., St. Louis 63101

Judge Robert G. Dowd, Civil Courts Bldg., St. Louis, Mo. 63101

APPENDIX H

In the Missouri Court of Appeals
St. Louis District
Division Two

April Session, 1975

Lester L. Fulton,
Plaintiff-Respondent,
v.
International Telephone & Telegraph Corporation,
Defendant-Appellant.

Nos. 36090 and 36091

Appeal From Circuit Court
City of St. Louis
Hon. Michael J. Scott and
Hon. William E. Buder, Judges
Opinion Filed August 5, 1975

These are consolidated appeals; that in Cause No. 36090 from the granting of a special order allowing the appellant (hereinafter the defendant) to file a notice of appeal out of time, Rule 81.07, from a default judgment entered in the Circuit Court of the City of St. Louis on September 28, 1973, and that in Cause No. 36091 from an order of the same court denying defendant's First Amended Motion to Set Aside Judgment and to Quash Execution and Petition for Review. Respondent (hereinafter the plaintiff) filed in this court a Motion to Dismiss the Appeal in Cause No. 36090, on the grounds that the defendant does not satisfy the criteria for the granting of the special order. Plaintiff's Motion to Dismiss has been taken with the case. For reasons hereinafter set out, we sustain plaintiff's Motion to Dismiss defendant's appeal from the default judgment, entered on September 28, 1973, in the Cir-

cuit Court of the City of St. Louis and we further affirm the trial court's denial of defendant's Motion to Set Aside Judgment, Quash Execution and Petition for Review.

Plaintiff filed his petition seeking damages for violation of the Service Letter Statute, § 290.140 RSMo. 1939, on the 14th day of March, 1973. Count I of plaintiff's petition prayed for actual damages of $21,000.00; Count II, punitive damages of $100,000.00. Personal service was had on C. T. Corporation System, 314 North Broadway, St. Louis, Missouri, the registered agent of the defendant, by serving a copy of the petition and summons on E. G. Farrelley, Secretary of the C. T. Corporation System, on March 16, 1973. No appearance having been entered on behalf of the defendant, and no motions or answer having been filed, plaintiff on June 12, 1973, upon request, was granted a default and inquiry, and the cause was set for hearing on June 28, 1973. On June 28, 1973, defendant still being in default, inquiry was conducted and at the request of the trial court a memorandum was filed and the cause was taken under submission. On September 28, 1974, judgment was entered in behalf of plaintiff in the amount of $21,000.00 on Count I of his petition and $75,000.00 on Count II of his petition.

On November 14, 1974, an entry of appearance was made by a St. Louis law firm in the trial court and at said time a Motion to Set Aside Judgment, Quash Execution and Petition for Review was filed. The following day, November 15, 1973, counsel for the defendant filed a Motion to Stay Execution and plaintiff's counsel was noticed to appear in the trial court on November 20, 1973, to take up defendant's Motion to Stay Execution. On said date, November 20, 1973, defendant's Motion to Stay Execution was taken up and submitted. On December 5, 1973, verification of the Motion to Stay Execution was filed and an indemnity bond in the amount of $115,000.00 with surety was presented and approved. The trial court on said date entered an order staying execution of

the judgment, and called up defendant's Motion to Set Aside the Judgment and Petition for Review and heard arguments thereon. Defendant filed an affidavit for continuance and the Motion was reset for December 19th, 1973. On December 19, 1973, the Motion was continued to December 20, 1973, and the defendant filed its First Amended Motion to Set Aside Judgment and to Quash Execution and Petition for Review. On February 6, 1974, plaintiff filed his Answer to defendant's First Amended Motion to Set Aside Judgment and to Quash Execution and Petition for Review. On February 7, 1974, defendant's First Amended Motion to Set Aside Judgment and to Quash Execution and Petition for Review was heard and submitted and each party granted time until February 14, 1974, to file briefs. On February 20, 1974, the trial court entered its order denying defendant's Motion to Set Aside Judgment, and to Quash Execution and Petition for Review. On March 1, 1974, defendant filed its Notice of Appeal to the Supreme Court "from the appealable order entered in this action on the 20th day of February, 1974" and ten days later followed with a Motion for a Special Order to File a Notice of Appeal Out of Time pursuant to Rule 81.07 from the "judgment entered September 28, 1973" also in the Supreme Court. On March 18, 1974, the Supreme Court, on its own motion, transferred both the direct appeal from the default judgment of September 28, 1973, and the appeal from the order denying the defendant's Motion to this court on the grounds that jurisdiction in both was vested in the Missouri Court of Appeals, St. Louis District. On March 21, 1974, upon receipt of the two files from the Supreme Court, this court, inadvisedly we conclude, sustained defendant's Motion for a Special Order to File a Notice of Appeal Out of Time pursuant to the provisions of Rule 81.07.

We have concluded that the order permitting the defendant to file its notice of appeal out of time was improvidently granted, should now be set aside and held for naught, and defendant's appeal from the default judgment of September

28, 1973, be dismissed. We have reached this conclusion because we believe that the granting of the Order for the filing of a Notice of Appeal out of time under the facts of this particular case is at odds with the principle that the trial court should be initially afforded the opportunity to have called to its attention and to correct alleged errors committed by itself before an appellate court attempts a review thereof. The trial court in this case was afforded this opportunity by defendant's motions, held a hearing thereon, and thereafter entered an appealable order denying the relief sought by the defendant and from which the defendant has also perfected an appeal in this court in Cause No. 36091. Both appeals raise essentially the same Points Relied On for reversal of the trial court's judgments, and it would be a squandering of judicial time and effort to review the same grounds in two separate appeals.

For these reasons we sustain plaintiff's motion to dismiss defendant's direct appeal from the default judgment of September 28, 1973, and set aside and hold for naught the order of this court granting said appeal out of time as having been improvidently granted.

Moving now the defendant's appeal from the order of the trial court of February 20, 1974, denying defendant's motion to set aside the default judgment and petition for review—Cause No. 36091. It is necessary to set out in some detail the almost incomprehensible procrastination practiced by house counsel for the defendant once he received a copy of the summons and petition served on defendant's registered agent some time between March 20, 1973 and March 26, 1973, and the date of the entry of the default judgment on September 28, 1973.

Despite the fact he was notified by plaintiff's counsel by letter of June 5, 1973, that unless an entry of appearance or pleading were filed within one week on June 5, 1973, plaintiff would have no recourse but to take a default, no communication was

forthcoming from defendant's house counsel until June 29, 1973—the day after the inquiry hearing—when he advised plaintiff's counsel that he had called his office that day and was told that he was out of town and that he, defendant's house counsel, would be on vacation between July 2, and 6, but that he wanted to discuss the matter upon his return to his office on July 9, and if they could not reach an agreement he had "plans to retain" local counsel. An associate of plaintiff's counsel responded to this letter on July 2, 1973, and advised defendant's house counsel that he was now handling the cause, acknowledged receipt of the letter of June 29th and asked that defendant's house counsel call him when he had returned to his office.

On September 26, 1973, the trial judge mailed to the defendant's house counsel—who had not entered his appearance nor hired local counsel to do so by that time—a copy of a proposed memorandum for the clerk of the court which reads as follows:

> "Cause called. Plaintiff appears. Although called thrice, defendant appears not and remains in default. Upon testimony and evidence previously heard and adduced the Court **will rule as follows on September 28, 1973:**
>
> Judgment and finding of Court in favor of Plaintiff on Count I in the sum of $21,000.00 and costs.
>
> Judgment and finding of Court in favor of Plaintiff on Count II in the sum of $75,000.000 as punitive damages." (Emphasis supplied.)

On September 28, 1973, the default judgment was entered in accordance with memorandum aforesaid. The copy of the proposed memorandum was received by defendant's house counsel on October 1, 1973, the Monday following the judgment entry of September 28, 1973, a Friday.

Following receipt of the court memorandum on October 1, 1973, defendant's house counsel took no action so far as plain-

tiff's counsel was aware until November 9, 1973, when he was advised by a telegram initiated to him by plaintiff's counsel that execution had been ordered on the judgment. This elicited a long distance telephone call from defendant's house counsel to plaintiff's counsel during which defendant's house counsel admitted his dereliction and pled for some time to see what he could do to alleviate the situation in which he found himself. Plaintiff's counsel agreed not to levy execution that date but requested defendant's house counsel to "get back to him" later that same day. House counsel did not "get back to" plaintiff's counsel and the next activity in the case was the entry of appearance of present counsel for the defendant on November 14, 1974, and the filing of defendant's Motion to Set Aside Judgment and to Quash Execution and Petition for Review.

A motion to set aside a default judgment is in the nature of an independent proceeding and a direct attack on the judgment. The name given the proceeding is unimportant, but in order to prevail on a motion to set aside a default judgment, the moving party must allege and prove that there was good reason for the default. Counsel's negligence in permitting the entry of a judgment by default is, in the absence of fraud or collusion, imputable to the client and the client is not entitled to relief. Askew v. Brown, 450 SW2d 446, 450 [2-5], (Mo. App. 1970). The motion is one which appeals to the sound discretion of the trial court and the Court of Appeals will not interfere with the trial court's action unless the record clearly demonstrates that there was an abuse of discretion and judgment on the motion was clearly erroneous. Ward v. Cook United, Inc., 521 SW2d 461, 470[10] (Mo.App. 1975).

While defendant does not allege fraud or collusion in the procurement of the judgment, reference is made to what it contends was a concealment of facts from the trial court which would have precluded the entry of judgment had the trial court known of their existence. These alleged facts may be divided into two categories: (1) that his testimony at the hearing for

the assessment of damages was untruthful and perjurious and (2) that he thereby concealed from the trial court that defendant actually was the source of his subsequent employment so that there was an absence of actual malice, spite, ill will, wantonness and maliciousness which was necessary to support an award of punitive damages. This contention is based upon testimony offered at the evidentiary hearing by the defendant. However, such evidence was merely in conflict with that of the plaintiff at the hearing to assess damages and is not the fraud referred to in the cases ruling on motions of this kind. False testimony or perjury ordinarily is not ground for vitiating a judgment. The fraud that vitiates a judgment is fraud which goes to its procurement, not fraud relating to the merits of the action. Head v. Ken Bender Buick Pontiac Inc., 452 SW2d 596, 598[6] (Mo.App. 1970).

We do not reach the question whether defendant presented sufficient evidence to establish that it had a meritorious defense to plaintiff's claim; the mere existence of a defense to the original action alone is ordinarily not a ground for vacating the judgment. Rubbelke v. Aebli, 340 SW2d 747, 751[3] (Mo. 1960).

We have concluded that the trial court did not abuse its discretion in denying defendant's Motion to Set Aside, Quash Execution and Petition for Review and therefore affirm.

The judgment of the trial court is affirmed.

JOHN J. KELLY, JR.,
Judge

James D. Clemens
(Presiding Judge)
Concurs

Joseph G. Stewart
(Judge)
Concurs

APPENDIX I

In the
Missouri Court of Appeals
St. Louis District

Lester L. Fulton, Respondent-Plaintiff, vs. International Telephone and Telegraph Corporation, Appellant-Defendant.	Consolidated Appeals No. 36,090 and No. 36,091.

MOTION TO REINSTATE APPEAL NO. 36090, FOR REHEARING OF CONSOLIDATED APPEALS NOS. 36090 AND 36091, OR IN THE ALTERNATIVE FOR TRANSFER TO THE ST. LOUIS DISTRICT OF THE MISSOURI COURT OF APPEALS EN BANC, OR IN THE ALTERNATIVE FOR TRANSFER TO THE MISSOURI SUPREME COURT.

Comes now defendant-appellant, and for its Motion to reinstate Appeal No. 36090, for a rehearing on consolidated Appeals Nos. 36090 and 36091, or in the alternative for transfer of said consolidated appeals to the St. Louis District of the Missouri Court of Appeals, en banc, or in the alternative for transfer to the Missouri Supreme Court, states as follows:

I. **This Court, in Dismissing Appeal No. 36090, Overlooked and Misinterpreted Material Matters of Law and Fact as Shown by Its Opinion in That:**

A. In premising its dismissal of the appeal in Appeal No. 36090 on the asserted "principle that the trial court

should be initially afforded the opportunity to have called to its attention and to correct alleged errors committed by itself before an appellate court attempts a review thereof," the opinion is contrary to Rule 73.01, Missouri Rules of Civil Procedure, and *Timmerman v. Ankrom*, 487 S.W.2d 567 (Mo.Sup., 1972), and this Court has either overlooked or misinterpreted said Rule and decision.

B. In premising its dismissal of Appeal No. 36090 on the grounds that the trial court was afforded this opportunity to correct its alleged errors by the filing of the defendant's Motion and First Amended Motion to Set Aside Judgment and to Quash Execution and Petition for Review, this Court has overlooked or misinterpreted the law and facts because the trial court was proscribed from making a broad review into the sufficiency of the evidence to support the damage awarded by the decisions in *Edson v. Fahy*, 330 S.W.2d 854, 859(8) (Mo.Sup., 1960), and *Head v. Ken Bender Buick Pontiac, Inc.*, 452 S.W.2d 596 (St.L. App., 1970), and Judge Buder applied the rule of law in those decisions and refused to consider sufficiency of the evidence to support the judgment. This Court's opinion is therefore contrary to the *Edson* and *Head* decisions, *supra*.

C. In premising its dismissal on the statement that both appeals (Nos. 36090 and 36091) raise esssentially the same points relied on for reversal of the trial court's judgment and that it would be a squandering of judicial time and effort to review the same grounds in two separate appeals, the Court has overlooked the first and fourth points relied on in Appeal No. 36090 which were not raised in Appeal No. 36091. Further, none of the points raised in common by the two appeals were considered in arriving at a decision on the merits of Appeal No. 36091.

D. This Court had no power, authority or discretion to dismiss Appeal No. 36090 on the grounds asserted for said

dismissal in the opinion rendered in this consolidated appeal. The Court's opinion is contrary to, and either overlooked or materially misinterpreted, the previously decided cases of *State ex rel. Bayha v. Kansas City Court of Appeals*, 97 Mo. 331, 10 S.W. 855 (Mo.Sup., 1889), and *State ex rel. Mayfield v. City of Joplin*, 485 S.W.2d 473 (Sp.App., 1972).

E. The dismissal of Appeal No. 36090 deprived the appellant-defendant of due process of law in violation of Article I, Section 10 of the Constitution of Missouri, and Amendment 14 of the United States Constitution, and Article V, Section 5 of the Constitution of Missouri.

II. **This Court, in Affirming the Lower Court's Decision in Appeal No. 36091 Overlooked or Misinterpreted Material Matters of Law and Fact as Follows:**

A. This Court's conclusion that the appellant-defendant must allege and prove good reason for the default in order to prevail on its Motions filed in this case, materially misinterprets the law and is contrary to the previous decisions in the cases of *Berry v. Chitwood*, 362 S.W.2d 515, 517(3) (Mo.Sup., 1962); *State ex rel. Rhine v. Montgomery*, 422 S.W.2d 661, 663(3) (Sp.App., 1967); *McCoy v. Briegel*, 305 S.W.2d 29, 34(2) (St.L.App., 1957); and *Dewey v. Union Electric Light & Power Co.*, 83 S.W.2d 203 (St.L.App., 1935).

B. This Court materially misinterpreted the law in implicitly concluding that the irregularities asserted in defendant's Motions and Briefs were not a ground for relief in the absence of showing that there was good cause for the default, which is contrary to the decisions of the Missouri Supreme Court and Court of Appeals in *Berry v. Chitwood*, 362 S.W.2d 515, 517(3) (Mo.Sup., 1962); *State ex rel. Rhine v. Montgomery*, 422 S.W.2d 661, 663(3) (Sp.App., 1967); *McCoy v. Briegel*, 305 S.W.2d 29, 34(2) (St.L.App., 1957); and *Dewey v. Union Electric Light & Power Co.*, 83 S.W.2d 203 (St.L.App., 1935).

C. This Court on Appeal No. 36091 overlooked the material matters of fact and law raised by Points I, II and III of the appellant-defendant's Brief in Appeal No. 36091 as the opinion indicates that none of the matters raised in those points was considered.

D. The Court overlooked or misinterpreted a material matter of fact in failing to observe that the thrust of the appellant's Motion and Argument on Appeal No. 36091 was that the judgment entered was coram non judice and void and failing to consider and determine the merit of this point.

III. **This Consolidated Appeal Should Be Transferred to the Missouri Supreme Court Because as Pointed Out in Section I, Paragraphs A, B, D and E, and Section II, Paragraphs A and B of This Motion and Suggestions in Support Thereof, the Opinion Is Contrary to Previous Decisions of the Missouri Supreme Court or Other Appellate Courts.**

IV. **This Consolidated Appeal Should Be Transferred to the Missouri Supreme Court Because It Involves the Following Questions of Law of General Interest and Importance:**

A. The question of whether or not this Court can dismiss an appeal on the grounds stated in the opinion after issuing a special order under Supreme Court Rule 81.07 and Section 512.060, Missouri Revised Statutes, 1969, allowing filing of a Notice of Appeal out of time and after appellant has duly perfected that appeal and complied with Court rules in pursuing said appeal.

B. The question of whether or not the trial court must be given an opportunity to correct its errors before appeal of a non-jury case.

C. The question of whether or not a showing of good cause for the default is a necessary condition precedent to setting aside a default judgment challenged on grounds that it is coram non judice and void.

D. The question of whether or not the irregularities present on the record of this cause are legally grounds for setting aside the judgment.

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231-5833
Attorneys for Appellant-Defendant

Acknowledgment of Service

The undersigned, attorney for plaintiff-respondent, certifies that on this 19th day of August, 1975, a copy of the above and foregoing was personally delivered to his office.

ROBERT H. LAVIN

APPENDIX J

Office of the Clerk
Area Code 314
493-4344

Gerald M. Smith, Chief Judge
Robert G. Dowd, Judge
Joseph J. Simeone, Judge
Harry L. C. Weier, Judge
James D. Clemens, Judge
John J. Kelly, Jr., Judge
Theodore McMillian, Judge
George F. Gunn, Jr., Judge
Joseph G. Stewart, Judge
Albert L. Rendlen, Judge

Missouri Court of Appeals
St. Louis District
Civil Courts Building St. Louis, Mo. 63101

September 8, 1975

Messrs. Lavin & Drese
Attorneys at Law
705 Olive St., Suite 1025
St. Louis, Mo. 63101

Messrs. Lewis, Rice,
Tucker, Allen & Chubb
Mr. James W. Herron
Attorneys at Law
611 Olive St., Suite 1400
St. Louis, Mo. 63101

Nos. 36090 & 36091—Lester L. Fulton, Respondent, v. International Telephone and Telegraph Corporation, Appellant.

Gentlemen:

The Court has today made the following order in the above entitled cause:

Appellant's motion for rehearing or transfer to Court En Banc or transfer to Supreme Court denied.

Yours truly

ROSALIE THIES
Deputy Clerk

gb

9-9-75

APPENDIX K

In the Supreme Court
of the
State of Missouri

Lester L. Fulton, Respondent-Plaintiff, vs. International Telephone and Telegraph Corporation, Appellant-Defendant.	Consolidated Appeals Nos. 36090 and 36091, in the Missouri Court of Appeals, St. Louis District No. 59258.

APPLICATION FOR TRANSFER OF CONSOLIDATED APPEALS 36090 AND 36091

Comes now appellant-defendant and applies to this Court for an Order transferring consolidated appeals 36090 and 36091 from the Missouri Court of Appeals, St. Louis District, to this Court. As grounds for this Application, appellant-defendant states as follows:

I

The Opinion of the Missouri Court of Appeals, St. Louis District, in This Consolidated Appeal Is Contrary to Previous Decisions of Appellate Courts of This State.

A. The Court of Appeals, in dismissing appeal 36090 and refusing to consider the merits of that appeal, acted contrary to decisions of appellate courts of this state in one or more of the following respects:

1. In premising its dismissal of the appeal in Appeal 36090 on the asserted "principle that the trial court should be initially afforded the opportunity to have called to its attention and to correct alleged errors committed by itself before an appellate court attempts a review thereof," the opinion is contrary to *Timmerman v. Ankrom*, 487 S.W.2d 567 (Mo.Sup., 1972) and Rule 73.01, Missouri Rules of Civil Procedure which provide that no motion for new trial is required for review of a court tried non-jury case.

2. In premising its dismissal of Appeal No. 36090 on the grounds that the trial court was afforded this opportunity to correct its alleged errors by the filing of the defendant's First Amended Motion to Set Aside Judgment and to Quash Execution and Petition for Review after more than thirty days had passed since entry of the judgment, the court's decision was contrary to *Edson v. Fahy*, 330 S.W.2d 854, 859(8) (Mo.Sup., 1960), which proscribed the trial court from making a broad review into the sufficiency of the evidence to support the damage award.

3. In dismissing Appeal No. 36090, the Court acted contrary to the decision of *State ex rel. Bayha v. Kansas City Court of Appeals*, 97 Mo. 331, 10 S.W. 855 (Mo.Sup., 1889), and *State ex rel. Mayfield v. City of Joplin*, 485 S.W.2d 473 (Sp.App., 1972) which hold that the court should decide the appeal on its merits and has no power to dismiss the appeal on the grounds asserted.

B. In affirming, in Appeal No. 36091, the trial court's decision overruling defendant's First Amended Motion to Set Aside Judgment, etc., the appellate court's opinion was contrary to decisions of appellate courts of this state in one or more of the following respects:

1. The Court's conclusion that the appellant-defendant must allege and prove good reason for the default in order

to prevail on its motions filed in this case, is contrary to the previous decisions in the cases of *Berry v. Chitwood*, 362 S.W.2d 515, 517(3) (Mo. Sup., 1962) and *State ex rel. Rhine v. Montgomery*, 422 S.W.2d 661, 663(3) (Sp.App., 1967) because the defendant's attack on the judgment was based on the assertion that the judgment was void and the cases cited hold that attacks on a void judgment are not limited to grounds assertable under Rule 74.32, Missouri Rules of Civil Procedure.

2. The Court implicitly concluded that the irregularities asserted in defendant's Motion and Briefs were not a ground for relief in the absence of showing that there was good cause for the default, which is contrary to the decisions of the Missouri Supreme Court and Springfield Court of Appeals in *Berry v. Chitwood*, 362 S.W.2d 517 (3) (Mo.Sup., 1962) and *State ex rel. Rhine v. Montgomery*, 422 S.W.2d 661, 663(3) (Sp.App., 1967) which establish that a void judgment gains no legitimacy from the action or inaction of the defaulting party.

II

This Consolidated Appeal Should Be Transferred to the Missouri Supreme Court Because It Involves the Following Questions of Law of General Interest and Importance:

A. The question of whether or not an appellate court can dismiss an appeal on the grounds stated in the opinion, that being:

> "[T]hat the trial court should be initially afforded the opportunity to have called to its attention and to correct alleged errors committed by itself before an appellate court attempts a review thereof,"

after allowing filing of a Notice of Appeal out of time and after appellant has duly perfected that appeal and complied with court rules in pursuing said appeal.

B. The question of whether or not the trial court must be given an opportunity to correct its errors before appeal of a default judgment, entered by a judge sitting without a jury.

C. The question of whether or not a showing of good cause for the default is a necessary condition precedent to setting aside a default judgment challenged on grounds that it is coram non judice and void.

D. The question of whether or not the irregularities present on the record of this cause, those being that the judgment was entered on a cause of action not pleaded and therefore was *coram non judice*, that a de facto amendment of the pleading occurred without service of an amended pleading on defendant, and that defendant was denied due process of law, are legally grounds for setting aside the judgment.

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Attorneys for Appellant-Defendant

APPENDIX L

Supreme Court No. 59258
Court of Appeals Nos. 36090 and 36091
In the Supreme Court of Missouri

September Session 1975

Lester L. Fulton, Respondent,

vs. Transfer

International Telephone & Telegraph Corporation, Appellant.

Now at this day, on consideration of appellant's Application to transfer the above entitled cause from the St. Louis District of the Missouri Court of Appeals, it is ordered that said application be, and the same is hereby denied.
State of Missouri—SCt.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1975, and on the 10th day of November 1975, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 10th day of November, 1975.

THOMAS F. SIMON, Clerk
By VIRGINIA H. GOTTLIEB, D. C.

APPENDIX M

POINTS RELIED ON

I

The Court Erred in Not Vacating and Setting Aside the Judgment Entered September 28, 1973, Because It Was Entered on Causes of Action Not Within the Purview of the Pleadings and Therefore Was Coram Non Judice and Void.

A Court's jurisdiction in granting a default judgment extends only to the boundaries of the plaintiff's pleading. A judgment based on issues not raised by the pleadings is, therefore, *coram non judice* and void.

Burns v. Ames Realty Co., 31 S.W.2d 274, 276 (St.L. App., 1930);

Kemp v. Woods, 251 S.W.2d 684, 688 (Mo. Sup., 1952);

Reynolds v. Stockton, 140 U.S. 254, 11 S.Ct. 773, 35 L.Ed. 464 (1891);

Restatement of Judgments, Ch. 2, § 8, Pages 48-9;

49 C.J.S., Judgments § *60*;

47 Am. Jur. 2d, Judgments § *1177*;

Rule 74.11, Missouri Rules of Civil Procedure.

There was no basis for entry of the judgment on the cause of action pleaded. A review of the evidence introduced at the June 28 hearing clearly shows there was no basis for the damages assessed. The fatal deficiencies in evidence revealed by a review of the transcript of the June 28 evidentiary hearing are:

(1) There is no evidence to show prospective employment lost by reason of failure to have a service letter,

the salary to be paid in any such position and the date when employment would commence, and

(2) There is no evidence that plaintiff lost a prospective employment in the St. Louis area by reason of failure to have a service letter.

There was therefore, no basis in law for entry of the judgment of actual and punitive damages on the pleaded cause of action.

Johnson v. American Mutual Liability Insurance Co., 335 F. Supp. 390 (W.D. Mo., 1971);

Booth v. Quality Dairy Co., 393 S.W.2d 845 848(2) (St.L. App., 1965);

Heuer v. John R. Thompson Co., 251 S.W.2d 980, 985 (4) (St.L. App., 1952);

Bubke v. Allied Building Credits, Inc., 380 S.W.2d 516 (St.L. App., 1964);

Beggs v. Universal C.I.T. Credit Corp., 409 S.W.2d 719 (Mo. Sup., 1966).

The record discloses that the judgment was based on issues and causes of action not within the purview of the issues made by his pleadings, including breach of contract of employment by wrongful discharge, blacklisting, interference with contractual relations, conspiracy and fraudulently inducing plaintiff to enter employment with defendant. Wrongful discharge is not part of a claim for breach of the Service Letter Statute.

Woods v. Kansas City Club, 386 S.W.2d 62 (Mo. Sup., 1964);

Roberts v. Emerson Electric Mfg. Co., 338 S.W.2d 62 (Mo. Sup., 1960).

The judgment being void is subject to being attacked at any time and the avenues of attack are not limited as in attacks on judgments which are voidable.

State ex rel. Rhine v. Montgomery, 422 S.W.2d 661 (Sp. App., 1967);

Wooden v. Friedenburg, 198 S.W.2d 1 (Mo. Sup., 1946);

Dewey v. Union Electric Light & Power Co., 83 S.W.2d 203 (St.L. App., 1935);

McCoy v. Briegel, 305 S.W.2d 29, 34(2) (St.L. App., 1957).

The Trial Court mistakenly concluded that a void judgment could only be attacked for an irregularity within the meaning of Rule 74.32, Missouri Rules of Civil Procedure.

Berry v. Chitwood, 362 S.W 2d 515, 517(3) (Mo. Sup., 1962).

II

The Record Discloses That the Judgment Was Entered in Violation of Fundamental Due Process Requirements of the Missouri and United States Constitutions.

Article I, Section 9 of the Constitution of Missouri;

Amendment XIV to the United States Constitution.

Due process of law requires, as a bare minimum, notice and an opportunity to be heard.

Flickinger v. Flickinger, 494 S.W.2d 388, 394(14) (K.C. App., 1973).

III

The Trial Court Erred in Concluding That the Record in This Cause, During the Period Prior to Entry of the Judgment, Showed No Irregularities Which Required the Judgment Be Set Aside (T. 193).

An irregularity within the purview of Rule 74.32, Missouri Rules of Civil Procedure, is a want of adherence to some pre-

scribed rule or mode of proceeding: and it consists either in omitting to do something that is necessary for the due and orderly conduct of a suit, or doing it in an unreasonable time or improper manner.

Crabtree v. Aetna Life Ins. Co., 111 S.W.2d 103, 106 (Mo. Sup., 1937).

The record, including the transcript of the evidentiary hearing and the memorandum filed by plaintiff prior to judgment, shows, without recourse to extrinsic evidence, the presence of irregularities within the definition in the *Crabtree* case.

Dewey v. Union Electric Light & Power Co., 83 S.W.2d 203 (St.L. App., 1935);

Rook v. Oliver Trucking Company, 505 S.W.2d 157 (St. L. App., 1973);

Lawton-Byrne-Bruner Ins. A. Co. v. Air-Flight Cab Co., 479 S.W.2d 218 (St.L. App., 1972);

Flickinger v. Flickinger, 494 S.W.2d 388 (K.C. App., 1973).

The irregularities disclosed include:

(a) The judgment was entered on causes of action not pleaded (see Section I, above) and therefore is *coram non judice* and void.

Hecker v. Bleich, 3 S.W.2d 1008 (Mo. Sup., 1927);

Rule 74.11, Missouri Rules of Civil Procedure.

(b) A de facto amendment of the pleading occurred without service of an amended pleading on Defendant.

Diekman v. Associates Discount Corporation, 410 S.W. 2d 695 (St.L. App., 1966);

Rule 43.01(a), Missouri Rules of Civil Procedure;

Rule 74.11, Missouri Rules of Civil Procedure.

(c) The record discloses a denial of fundamental due process.

Crabtree v. Aetna Life Ins. Co., supra.

IV

Defendant-Appellant Had a Meritorious Defense to the Plaintiff's Claim Because the Record Discloses That the Plaintiff's Petition Was Untrue in Various Material Matters and Plaintiff Had No Claim for Relief as a Matter of Law.

Plaintiff's own evidence at the June 28 hearing disproved his allegations that the absence of a service letter precluded him from securing similar employment to that he had with the defendant and that he sustained $21,000 damages as a result of failing to have a service letter.

Plaintiff concealed from and failed to advise the Court that the defendant had recommended him for and obtained his subsequent employment with a distributor, which was a defense to the allegations in Count II that the absence of a service letter was due to actual malice, spite, ill will, and was wilfull, wanton and malicious.

Evidence introduced by the plaintiff at the June 28 evidentiary hearing established that he had no claim for relief under the Service Letter Statute.

Horstman v. General Electric Company, 438 S.W.2d 18 (K.C. App., 1969).

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-841

LESTER L. FULTON,
Respondent,

vs.

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,
Petitioner.

On Petition for Writ of Certiorari to the Supreme Court of the United States

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	4
Statement of the Case	4
Reasons for Denying the Writ of Certiorari	9
Conclusion	12
Appendix A—Certified Letter to Robert Bucci, Counsel for Defendant	A-1
Appendix B—Interim Order of Circuit Court	A-2
Appendix C—Transcript of Telephone Conversation Between Counsel for Plaintiff and Counsel for Defendant	A-3
Appendix D—Plaintiff's Answer to Defendant's First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review	A-8
Appendix E—Plaintiff's Motion to Dismiss Defendant's Appeal from the Judgment	A-20
Appendix F—Rule 81.07, Missouri Rules of Civil Procedure	A-55

Cases Cited

Casper v. Lee, 245 S.W. 2d 132 (Mo. Sup. Ct. En Banc, 1952)	10
Hendershot v. Minich, 297 S.W. 2d 403 (Mo. Sup. Ct., Div. 2, 1956)	11

Horstman v. General Electric Company, 438 S.W. 2d 18 (K. C. Ct. App., 1969) 10

Ruckman v. Ruckman, 337 S.W. 2d 100 (St. L. Ct. App., 1960) 11

Trumbull v. Trumbull, 393 S.W. 2d 82 (St. L. Ct. App., 1965) 11

Statutes and Miscellaneous Cited

28 U.S.C. § 1257(3) 2

Fourteenth Amendment to the Constitution of the United States of America 2, 4, 9

Rule 81.07, Missouri Rules of Civil Procedure 9, 10

Section 290.140, Missouri Revised Statutes, 1969 5

IN THE

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LESTER L. FULTON,
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INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,
Petitioner.

On Petition for Writ of Certiorari to the Supreme Court of the United States

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully prays that this Honorable Court not issue a Writ of Certiorari to review the judgment of the Missouri Court of Appeals, St. Louis District, entered in the action on August 5, 1975, which became final on denial of the Defendant-Appellant's Application for Transfer to the Missouri Supreme Court on November 10, 1975.

OPINIONS BELOW

The Opinion of the Circuit Court of the City of St. Louis, Missouri, is reprinted in Petitioner's Appendix E and the Opinion of the Missouri Court of Appeals, St. Louis District, is

reprinted in Petitioner's Appendix H, same being styled *Lester Fulton, Respondent v. International Telephone & Telegraph Corp., Appellant,* Missouri Court of Appeals, St. Louis District, Division 2, 528 S.W. 2d 466.

JURISDICTION

Petitioner has not come within the purview of 28 U.S.C. § 1257(3) and accordingly, this Court is without jurisdiction to issue petitioner's Petition for Writ of Certiorari. Respondent, in support of his aforesaid position, states that the decision of the Missouri Supreme Court in the instant matter was devoid of any federal questions of substance that have not heretofore been determined by this Court or decisions that have been decided in a way probably not in accord with applicable decisions of this Court.

The Circuit Court, City of St. Louis, Missouri, entered judgment against the defendant on September 28, 1973, by default in the amount of $21,000 actual damages and $75,-000 punitive damages, plus costs. On February 4, 1974, long after the expiration of time for filing an appeal, the defendant filed its First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review, alleging, among other things, that the judgment was void because it violated the defendant's right to due process of law under the Fourteenth Amendment to the United States Constitution. It was respondent's contention that defendant had more notice to appear and defend at a hearing held on June 28, 1973, to prove up the plaintiff's damages, than has ever been required by the United States Constitution; that the aforesaid judgment was entered according to the procedural and substantive law of the State of Missouri on causes of action properly pleaded and of which defendant had notice. On September 19, 1973,

the Circuit Court of the City of St. Louis, Missouri, entered an Interim Order of Court indicating that judgment would be entered against defendant on September 28, 1973, in the aforesaid amount; that on September 26, 1973, the Circuit Court of the City of St. Louis, Missouri, by Court Memorandum to defendant, stated in writing the aforesaid action to be taken by the said Court; that thereafter, on September 28, 1973, the aforesaid judgment against defendant was, in fact, entered and a copy of said Entry of Judgment was mailed to defendant on September 28, 1973, and received by defendant on October 2, 1973; that defendant filed its Motion to Set Aside Judgment and to Quash Execution, and Petition for Review, on November 14, 1973, and its First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review, on February 4, 1974, and that a hearing was had on same on February 7, 1974; that on February 20, 1974, defendant's First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review, was overruled. Thereafter, on March 1, 1974, defendant appealed the said Court Order overruling defendant's Motion to Set Aside Judgment and to Quash Execution, and Petition for Review, and on March 22, 1974, also appealed directly from the judgment as entered on September 28, 1973. Plaintiff and defendant were required to both brief and argue both said appeals. On August 5, 1975, the Missouri Court of Appeals, St. Louis District, entered its Opinion dismissing the appeal from the judgment and affirming the decision of the Trial Court overruling defendant's said Motion to Set Aside Judgment and to Quash Execution, and Petition for Review. On August 19, 1975, defendant filed its Motion for Rehearing or Transfer to the Court En Banc. Same was denied on September 8, 1975. On October 11, 1975, defendant filed its Application for Transfer of the said appeals (now consolidated) to the Missouri Supreme Court and on November 10, 1975, said Application was denied.

This Brief in Opposition to petitioner's Petition for Writ of Certiorari has been filed within thirty (30) days of the date of service on respondent of said Writ as required by Rule 24, Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

Whether petitioner was denied the right to due process of law under the Fourteenth Amendment to the Constitution of the United States when:

(a) Said petitioner was duly served with process in a suit instituted in the Circuit Court, City of St. Louis, Missouri; and

(b) Said petitioner was afforded every opportunity required by law, and additional opportunities not required by law, to defend such suit, to move to set aside judgment and/or to file a timely notice of appeal, but deliberately elected not to do so; and

(c) Said petitioner, although out of time, was permitted to brief and argue the suit on its merits; and finally,

(d) The judgment on said suit was rendered within the prayer of the pleadings and within the scope of the pleadings.

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case of petitioner with the following exceptions and additions:

The "memorandum" requested of plaintiff's counsel by Judge Scott [T. 52/Petitioner's Appendix D/Exhibit A] was, in fact, prepared and delivered to Judge Scott by plaintiff's counsel on

the same date as the evidentiary hearing of June 28, 1973 [T. 55].

Respondent believes that this Court's time can best be utilized by the expediency of setting out the chronology of the events and dates thereof relative to this lawsuit, all of which ultimately led to this Petition for Writ of Certiorari.

Accordingly:

Prior to Evidentiary Hearing of June 28, 1973

March 15, 1973 Petition filed against defendant in Two Counts alleging a claim for relief under Section 290.140, R.S. Mo., Count I seeking actual damages in the amount of $21,000 and Count II seeking punitive damages in the amount of $100,000 [T. 1-3/Petitioner's Appendix A].

March 16, 1973 Registered Agent of defendant personally served (C. T. Corp.) [T. 7].

June 5, 1973 Certified letter from plaintiff's counsel to Mr. Robert Bucci, attorney and house counsel for defendant, advising that unless an entry of appearance or pleading was filed by defendant within one (1) week from date, plaintiff would have no alternative but to take a default [T. 13-14/Respondent's Appendix A].

June 7, 1973 Date on Return Receipt of aforesaid certified letter [T. 14].

June 13, 1973 Plaintiff granted default and inquiry by Circuit Court.

June 28, 1973 Evidentiary hearing on default, and filing on same date, by plaintiff, of "memorandum" [Petitioner's Appendix D/Exhibit A] requested by Judge Scott.

Subsequent to Evidentiary Hearing of June 28, 1973

September 19, 1973 Interim order of Circuit Court was entered in the Record indicating judgment to be entered against defendant on September 28, 1973, which said interim order indicated the amount of damages in both Counts, to wit: $21,000 actual damages on Count I, and $75,000 punitive damages on Count II [Respondent's Appendix B].

September 26, 1973 The Circuit Court sent a copy of the aforesaid interim order to defendant [T. 172-173/Respondent's Appendix B] same bearing postmark of September 26, 1973 [T. 174] and same being received by house counsel, specifically, Mr. Robert Bucci, on October 1, 1973 [T. 174].

September 28, 1973 Circuit Court's entry of judgment in accordance with the interim order referred to previously [Petitioner's Appendix B].

October 2, 1973 The defendant received a copy of the Circuit Court's entry of judgment on both Counts, in accordance with said Court's interim order [T. 174-175].

November 9, 1973 Transcript of telephone conversation with Mr. Robert Bucci, attorney and house counsel for defendant [T. 106-109/Respondent's Appendix C]; and, accompanying Affidavits of JoAnn Saputo [T. 106-108/Respondent's Appendix C/Exhibit 1], secretary to the attorneys for plaintiff, and Ross G. Lavin [T. 109-110/Respondent's Appendix C/Exhibit 2], and Daniel C. Aubuchon [T. 109-110/Respondent's Appendix C/Exhibit 3], two of plaintiff's attorneys, attesting to the contents of said conversation.

November 14, 1973 Defendant filed its Motion to Set Aside Judgment, Quash Execution and Petition for Review [T. 58-67/Petitioner's Appendix C].

November 15, 1973 Defendant filed its Motion to Stay Execution [T. 56-57].

February 4, 1974 Defendant filed its First Amended Motion to Set Aside Judgment, Quash Execution and Petition for Review [T. 68-95/Petitioner's Appendix D].

February 6, 1974 Plaintiff filed his Answer to defendant's First Amended Motion to Set Aside Judgment, Quash Execution and Petition for Review [T. 97-105/Respondent's Appendix D].

February 7, 1974 Evidentiary hearing on defendant's First Amended Motion to Set Aside Judgment, Quash Execution and Petition for Review [T. 112].

February 20, 1974 The Circuit Court, Judge Buder, overruled defendant's First Amended Motion to Set Aside Judgment, Quash Execution and Petition for Review [T. 192] and filed a "court memorandum opinion" [T. 192-194/Petitioner's Appendix E].

Thereafter, the defendant appealed Judge Buder's order of February 20, 1974, and the following dates and events relative thereto are hereinafter set out:

March 8, 1974 Defendant filed a Motion for a Special Order to file a Notice of Appeal Out of Time in the Missouri Supreme Court which said Motion was transferred to the Missouri Court of Appeals, St. Louis District [Petitioner's Appendix F and G].

April 4, 1974 Respondent filed his Motion to Dismiss this appeal with Suggestions in Support of same [Respondent's Appendix E].

August 5, 1975 The Missouri Court of Appeals, St. Louis District, rendered its Opinion [Petitioner's Appendix H] affirming the February 20, 1974, Order and dismissing the defendant's direct appeal from the default judgment of September 28, 1973 [Petitioner's Appendix H].

August 19, 1975 Defendant filed its Motion for Rehearing [Petitioner's Appendix I].

September 8, 1975 Defendant's Motion for Rehearing was denied [Petitioner's Appendix J].

October 11, 1975 Defendant filed its Application for Transfer of the Consolidated Appeals to the Missouri Supreme Court [Petitioner's Appendix K].

November 10, 1975 The Missouri Supreme Court denied defendant's Application for Transfer of Consolidated Appeals [Petitioner's Appendix L].

REASONS FOR DENYING THE WRIT OF CERTIORARI

The issue in the instant matter is narrow and unique to its facts. Simply stated the issue can be succinctly stated as follows: Was the defendant denied due process of law as required by the Fourteenth Amendment to the United States Constitution? Clearly, this is not true. Petitioner's allegation that the Missouri Court of Appeals, St. Louis District, "affirmed the Circuit Court's holding that the denial of due process present in this case did not constitute legal grounds for relief from the judgment" [Petitioner's Brief, Pg. 7] is completely and totally unfounded. Nowhere in said Opinion [Petitioner's Appendix H] is there a scintilla of reference to the defendant's having been denied due process. To the contrary, the Record in this case is replete with facts substantiating that plaintiff and the Courts of the State of Missouri gave defendant more due process than has ever been required by the Fourteenth Amendment to the United States Constitution.

Defendant's contention that the Missouri Court of Appeals, St. Louis District, dismissed its appeal on the merits without regard to the validity of the judgment is without merit. Despite the fact that the defendant was not within the purview of Rule 81.07, Missouri Rules of Civil Procedure [Respondent's Appendix F] relative to untimely appeals, the said Court permitted such an appeal and required the parties to brief and argue same. By permitting this appeal on the merits, the said Appellate Court, in subsequently dismissing said appeal as having been "improvidently granted", implicitly determined that, on the merits, the judgment was not void; that the judgment was not based on an alleged de facto amended petition; that the defendant had not been denied the due process required by the Fourteenth Amendment to the United States Constitution; that being a valid judgment, defendant, in order to prevail on a direct, untimely appeal from the judgment, must

of necessity, come within the purview of Rule 81.07, Missouri Rules of Civil Procedure [Respondent's Appendix F]. At this time, and only after the above consideration, defendant's appeal from the judgment was dismissed.

There can be no question but that the Courts below had jurisdiction of the parties and the subject matter. The Petition was filed in Missouri, and the defendant was duly served with process, the incredible and almost indescribable negligence of house counsel for defendant required plaintiff's counsel, in plaintiff's best interest, to take a default judgment. This negligence persisted until the judgment became final and the time for filing timely after-trial motions and notices of appeal had expired. Our Courts have consistently held that the negligence of an attorney is imputed to his client. ***Casper v. Lee***, 245 S.W. 2d 132 (Mo.Sup.Ct. En Banc, 1952).

The Missouri Appellate Courts have consistently held that the Missouri Service Letter Statute [Petitioner's Brief, Pg. 4] is intended to protect citizens of the State of Missouri who are employed in the State of Missouri regardless of whether the employer is a Missouri corporation, or a foreign corporation authorized to do business in Missouri. In *Horstman v. General Electric Company*, 438 S.W. 2d 18 (K.C.Ct.App., 1969), the Court states at Page 20:

> "We think the language 'whenever any employee of any corporation doing business in this State . . .' means an employee working in Missouri for a corporation doing business in Missouri. . . ."

Regarding the sufficiency of the pleadings, a cursory glance at plaintiff's Petition [Petitioner's Appendix A] reveals unequivocally that plaintiff stated a cause of action against the defendant.

That the evidence was sufficient to sustain the judgment is also quite clear. Petitioner, throughout this litigation, has been

insisting it is omniscient and can read the mind of the Trial Court. Petitioner has attempted to set out the reasons and reasoning employed by the Trial Court in arriving at its conclusion relative to the amounts of the judgment. Petitioner attempts to ferret out isolated matters of evidence and imply that the Court relied on certain specific items of evidence in arriving at its decision. Respondent respectfully suggests that the Trial Court heard the testimony at the June 28, 1973, hearing [T. 3-54], read respondent's "Memorandum" of June 28, 1973 [Petitioner's Appendix D/Exhibit A], had the opportunity to evaluate the credibility of the witnesses, presumably weighed said testimony and accompanying exhibits very carefully, and presumably rendered its judgment on those portions of the credible evidence it considered relevant and material. Thus, "where the judgment is within the jurisdiction of the Court rendering same it is presumed to be valid." ***Ruckman v. Ruckman***, 337 S.W. 2d 100, at Page 103 (St.L.Ct.App., 1960).

Similarly, "Judgment presumes jurisdiction over subject matter and over persons." *Trumbull v. Trumbull*, 393 S.W. 2d 82, at Page 88 (St.L.Ct.App., 1965); and, ". . . It is usually presumed that a court of general jurisdiction had jurisdiction of a cause, found all facts necessary, and took all steps necessary to enable it to render a valid judgment." *Hendershot v. Minich*, 297 S.W. 2d 403, at Page 410 (Mo.Sup.Ct., Div. 2, 1956).

Presumably, the Appellate Courts of the State of Missouri, in implicitly holding the judgment to be valid, agreed with the contention that the evidence was sufficient to sustain same.

Clearly, petitioner has had its day in Court and no amount of legal rhetoric can raise the constitutional issue of lack of due process under the Fourteenth Amendment to the United States Constitution, unless it can be said that petitioner's undue and unwarranted prolongation of this litigation is indicative of a denial of such due process to respondent simply because of the lengthy passage of time involved.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted

JULIUS H. BERG
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St. Louis, Missouri 63101

ROSS G. LAVIN
705 Olive Street, Suite 1025
St. Louis, Missouri 63101

Attorneys for Respondent-Plaintiff

APPENDIX

APPENDIX A

June 5, 1973

Certified Mail
Return Receipt Requested

ITT Communications Equipment and Systems
60 Washington Street
Hartford, Conn. 06106

Attn: Mr. Robert A. Bucci, Attorney

Re: Lester L. Fulton v. ITT

Dear Mr. Bucci:

It has been almost six weeks since I spoke with you relative to the above-styled matter.

Unless an entry of appearance and/or pleading is filed in this matter within one week from this date, I shall have no alternative but to take a default.

Your courtesy and cooperation will be appreciated.

Very truly yours

ROSS G. LAVIN

APPENDIX B

"Memorandum for Clerk

"Cause called. Plaintiff appears. Although called thrice, defendant appears not and remains in default. Upon testimony and evidence previously heard and adduced, the Court will rule as follows on September 28, 1973:

"Judgment and finding of Court in favor of Plaintiff on Count I in the sum of $21,000.00 and costs.

"Judgment and finding of Court in favor of Plaintiff on Count II in the sum of $75,000.00 as punitive damages.

"Filed September 19, 1973.

MICHAEL J. SCOTT, Judge"

APPENDIX C

(Exhibits C-1, C-2 and C-3 attached hereto and marked as such.)

"*Bucci:* I just received a call from Western Union-telegram over the phone on matter of Fulton v. ITT about final judgment. I guess I have been derelict as hell in this whole thing. My naivete and unfamiliarity with court proceedings—its not your problem—I was under the impression that I had more time than I had with default judgments. I was ashamed that I had allowed it to go by default. I tried to figure out what I was going to do on this—I didn't realize it could go to final judgment so quickly.

Lavin: It was filed back in March—like 8 months ago.

Bucci: What can I do?

Lavin: I don't know—its final.

Bucci: Is there any way it can be opened or anything done about it?

Bucci: What is that thing about ordering execution—the telegram said something about ordering execution—what is that?

Lavin: That means that if the judgment isn't paid we will have to execute on ITT's property in Missouri or if there isn't enough here, we will have to go to Hartford or New York or wherever we can find anything—if there's realty, record, a levy and order it sold until it is paid.

Bucci: What physically happens? What have you done or what do you do?

Lavin: All we have to do is take a certified copy of our judgment out to the Sheriff and provide him with a legal de-

scription of the real estate that ITT owns in that County and he sells it lock, stock and barrel and we can bid up to the amount of our judgment with interest and court costs until it is paid. If nobody else bids, then we take the property. It is beyond the point where anything can be done about it. My suggestion would be if you are going to do anything about it—as you know there is nothing you can do—would be to employ local counsel down here.

Bucci: Just as a professional courtesy may I beg of you to hold off on it?

Lavin: When will you do something?

Bucci: I will call right now and give you the particulars.

Lavin: We are not going to execute on anything today.

Bucci: It said something in the thing 'we have ordered execution'.

Lavin: The Circuit Court that has issued the judgment has written up an execution on the judgment—we have not proceeded to enforce the execution as of yet.

Bucci: I can see your side—I guess I screwed up but good. Right now I suppose I am thinking of two things—I have been much too cavalier and secondly, I am probably going to lose my job.

Lavin: What can I say—I'm sorry.

Bucci: Let me try to make a few calls—I have the name of a few outfits—I'll see if I can get one. Could I then be back to you? What time are you in until today?

Lavin: If I am not in, somebody will know where to reach me."

EXHIBIT C-1

Affidavit

State of Missouri }
City of St. Louis } ss

Jo Ann Saputo, first being duly sworn on her oath states:

1. That she is a legal secretary employed by the law firm of Aubuchon & Lavin located at 705 Olive Street, St. Louis, Missouri and has been so employed since August, 1964.

2. That on November 9, 1973 at approximately 2:10 P.M., at the request of Mr. Ross G. Lavin, she listened to a telephone conversation between Mr. Lavin and a man who identified himself as one Robert Bucci and took shorthand notes thereof; that thereafter she transcribed said notes and a transcription thereof is attached hereto, marked Exhibit A, and to the best of her knowledge, recollection and belief the transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri this 11th day of December, 1973.

/s/ Jo Ann Saputo

Subscribed and sworn to before me this . . . day of December, 1973.

. . . . . .
Notary Public

My term expires:

EXHIBIT C-2

Affidavit

State of Missouri }
City of St. Louis } ss

Ross G. Lavin, first being duly sworn on his oath states:

1. That he is a practicing attorney licensed in the State of Missouri and a partner in the law firm of Aubuchon & Lavin with officers at 705 Olive Street, St. Louis, Missouri.

2. That on November 9, 1973, at approximately 2:10 P.M., he received a telephone call from a man who identified himself as one Robert Bucci; that he instructed his associate, Daniel C. Aubuchon, and his secretary, Mrs. Jo Ann Saputo, to listen to said conversation; that this conversation was taken down in shorthand and thereafter transcribed by Mrs. Jo Ann Saputo; that he has reviewed the transcription of this conversation as contained in Answer of Plaintiff to Defendant's First Amended Petition to Set Aside Judgment, Quash Execution and Petition for Review and that to the best of his knowledge, recollection and belief this transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri this 5th day of February, 1974.

/s/ Ross G. Lavin

Subscribed and sworn to before me this 5th day of February, 1974.

/s/ Marge Rosemann
Notary Public

My term expires: Notary Public, State of Missouri, My Commission Expires Oct. 28, 1977.

EXHIBIT C-3

Affidavit

State of Missouri }
City of St. Louis } ss

Daniel C. Aubuchon, first being duly sworn on his oath, states:

1. That he is a practicing attorney licensed in the State of Missouri employed in the law firm of Aubuchon & Lavin with offices at 705 Olive Street, St. Louis, Missouri.

2. That on November 9, 1973 at approximately 2:10 P.M., at the request of Ross G. Lavin, he listened to a telephone conversation between Mr. Lavin and a man who identified himself as one Robert Bucci; that this conversation was taken down in shorthand and thereafter transcribed by Mrs. Jo Ann Saputo, secretary to Mr. Lavin; that he has reviewed the transcription of this conversation as contained in Answer of Plaintiff to Defendant's First Amended Petition to Set Aside Judgment, Quash Execution and Petition for Review and that to the best of his knowledge, recollection and belief this transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri this 5th day of February, 1974.

/s/ Daniel C. Aubuchon

Subscribed and sworn to before me this 5th day of February, 1974.

/s/ Marge Rosemann
Notary Public

(Seal)

My term expires: Notary Public, State of Missouri, My Commission Expires Oct. 28, 1977.

APPENDIX D

In the Circuit Court of the City of St. Louis
State of Missouri

Lester L. Fulton,
Plaintiff,
vs.
International Telephone and Telegraph Corporation,
Defendant.

Cause No. 36962
Division No. 1

Answer of Plaintiff to Defendant's First Amended Motion to Set Aside Judgment, Quash Execution and Petition for Review

Comes now plaintiff in the above-entitled cause and for answer to defendant's First Amended Motion to Set Aside Judgment, Quash Execution and Petition for Review, states as follows:

1. Plaintiff admits the allegations of Paragraph 1 of defendant's Motion, but states the fact to be that the "Memorandum" filed by plaintiff was so filed on the date of, but after the hearing on, plaintiff's cause of action, and was merely for the guidance of the Court and constitutes no part of the "record proper" in this case.

2. For answer to Paragraphs 2, 3 and 4 of defendant's Motion, plaintiff denies the allegations therein set forth and states that the matters therein set forth constitute possible defenses that could have been raised by defendant in the cause of action had it filed pleadings within the time allowed. Plaintiff states that said matters alleged in Paragraphs 2, 3 and 4 of defendant's Motion are not matters of which this Court can take cognizance in a Petition for Review.

3. For answer to Paragraph 5 of defendant's Motion, this plaintiff admits the sending and receipt and existence of all exhibits attached to defendant's original Motion and referred to in Paragraph 5 of defendant's Amended Motion. Plaintiff denies emphatically that said exhibits or any of them, lulled or could have lulled defendant's counsel into any false sense of security, but states the facts to be that defendant and its representatives were careless and wholly lacking in diligence in responding to the Petition and Summons served upon them in this case.

Plaintiff's counsel emphatically denies that they owed any duty to advise defendant of the status of the case after the hearing and state the fact to be that both plaintiff's counsel, in its letter of June 5, 1973, referred to in defendant's Motion and made a part of defendant's Motion, and the Court in sending defendant a memorandum of its intention to enter its judgment and a memorandum of the judgment so entered on September 28, 1973, which memorandums are incorporated in defendant's Motion, went far beyond the statutory or ethical duty in warning defendant of the consequences of their repeated failure to take any action regarding this suit pending against it and in which defendant was personally served.

Plaintiff further denies that the Clerk of this Court had any duty under Rule 74.78 of the Missouri Rules of Civil Procedure, to give any notice to defendant of the action taken by this Court or to act as loco parentis for the defendant to protect it from its own acts or slothfulness and stupidity in failing to file an answer when personally served and in failing to at least file a Motion to Set Aside the Judgment herein taken or Notice of Appeal within the proper time allowed by the Statutes of Missouri when they had adequate notice of the entry of such judgment.

4. For answer to Paragraphs 6, 7 and 8 of defendant's Motion, plaintiff denies the allegations thereof and states the facts to be that under the Statutes of the State of Missouri, in such cases made and provided, said allegations constitute no basis for either a Petition for Review or a Motion to Set Aside a Default Judgment more than thirty (30) days after its entry.

5. For further and other answer to defendant's Motion and in particular answer to defendant's allegations that its counsel could have been "misled" by any letter or conversation with plaintiff's counsel, this plaintiff alleges that on November 9, 1973, one Mr. Robert Bucci, an employee and "house counsel" for defendant, telephoned one Mr. Ross G. Lavin, one of plaintiff's counsel, in response to a telegram sent to defendant advising them that execution had been ordered on the final judgment. That said telephone conversation was taken down in shorthand by secretary for Mr. Ross G. Lavin, and is set out herein verbatim:

"*Bucci:* I just received a call from Western Union—telegram over the phone on matter of Fulton v. ITT about final judgment. I guess I have been derelict as hell in this whole thing. My naivete and unfamiliarity with court proceedings—its not your problem—I was under the impression that I had more time than I had with default judgments. I was ashamed that I had allowed it to go by default. I tried to figure out what I was going to do on this—I didn't realize it could go to final judgment so quickly.

Lavin: It was filed back in March—like 8 months ago.

Bucci: What can I do?

Lavin: I don't know—its final.

Bucci: Is there any way it can be opened or anything done about it?

Bucci: What is that thing about ordering execution—the telegram said something about ordering execution—what is that?

Lavin: That means that if the judgment isn't paid we will have to execute on ITT's property in Missouri or if there isn't enough here, we will have to go to Hartford or New York or wherever we can find anything—if there's realty, record a levy and order it sold until it is paid.

Bucci: What physically happens? What have you done or what do you do?

Lavin: All we have to do is take a certified copy of our judgment out to the Sheriff and provide him with a legal description of the real estate that ITT owns in that County and he sells it lock, stock and barrel and we can bid up to the amount of our judgment with interest and court costs until it is paid. If nobody else bids, then we take the property. It is beyond the point where anything can be done about it. My suggestion would be if you are going to do anything about it—as you know there is nothing you can do—would be to employ local counsel down here.

Bucci: Just as a professional courtesy may I beg of you to hold off on it?

Lavin: When will you do something?

Bucci: I will call right now and give you the particulars.

Lavin: We are not going to execute on anything today.

Bucci: It said something in the thing 'we have ordered execution.'

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much too cavalier and secondly, I am probably going to lose my job.

Lavin: What can I say—I'm sorry.

Bucci: Let me try to make a few calls—I have the name of a few outfits—I'll see if I can get one. Could I then be back to you? What time are you in until today?

Lavin: If I am not in, somebody will know where to reach me."

Plaintiff attaches and incorporates herein by reference the Affidavit of Mrs. Jo Ann Saputo, secretary to Mr. Ross G. Lavin; the Affidavit of Mr. Ross G. Lavin, one of the attorneys for plaintiff; and the Affidavit of Mr. Daniel C. Aubuchon, associate of Mr. Ross G. Lavin, regarding said telephone conversation and has marked said Affidavits as plaintiff's Exhibits 1, 2 and 3, and incorporates the same by reference.

Wherefore, plaintiff prays that said First Amended Motion of defendant to Set Aside Judgment, Quash Execution and Petition-for-Review should be overruled for the reasons as above set out, to wit:

(a) That said Motion does not constitute Petition for Review within the purview of Rule 74.12, Missouri Rules of Civil Procedure, because defendant was personally served.

(b) That said Motion does not constitute a sufficient Petition for Review under Rule 74.32, Missouri Rules of Civil Procedure, because it does not indicate or show any irregularity on the "face of the record" that would deprive the Court of jurisdiction to enter a judgment on the "face of the record" nor does it allege any facts from the "face of the record" which would have prevented the Court from entering a default judgment.

(c) No facts are alleged which would constitute "fraud in the procurement" of the judgment.

(d) All of the matters alleged in said Motion constitute defenses which defendant might have set out in the cause of action had it not "slept on its right" and slothfully failed to file an answer and plead to the Petition which was personally served upon it.

AUBUCHON & LAVIN
/s/ ROSS G. LAVIN
Attorneys for Plaintiff
705 Olive Street, Suite 1314
St. Louis, Missouri 63101
621-1575

State of Missouri }
City of St. Louis } ss

Ross G. Lavin, of lawful age, being duly sworn upon his oath, states that he is well and truly acquainted with all of the matters and facts in the aforegoing Answer and that the same are true to his best knowledge, information and belief, and that he verily believes the same to be true.

/s/ ROSS G. LAVIN

Subscribed and sworn to before me this 6th day of February, 1974.

/s/ JO ANN SAPUTO
Notary Public

My term expires: 10/10/75.

In the Circuit Court of the City of St. Louis
State of Missouri

Lester L. Fulton,
Plaintiff,
vs.
International Telephone and Telegraph Corporation,
Defendant.
No. 36962
Div. No. 1

Affidavit

State of Missouri }
City of St. Louis } ss

Jo Ann Saputo, first being duly sworn on her oath states:

1. That she is a legal secretary employed by the law firm of Aubuchon & Lavin located at 705 Olive Street, St. Louis, Missouri and has been so employed since August, 1964.

2. That on November 9, 1973 at approximately 2:10 P.M., at the request of Mr. Ross G. Lavin, she listened to a telephone conversation between Mr. Lavin and a man who identified himself as one Robert Bucci and took shorthand notes thereof; that thereafter she transcribed said notes and a transcription thereof is attached hereto, marked Exhibit A, and to the best of her knowledge, recollection and belief the transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri this 11th day of December, 1973.

/s/ JO ANN SAPUTO

Subscribed and sworn to before me this .... day of December, 1973.

.....
Notary Public

My term expires:

November 9, 1973

Re: Fulton v. ITT

Mr. Bucci called at 2:10 P.M. today.

B: I just received a call from Western Union—telegram over the phone on matter of Fulton v. ITT about final judgment. I guess I have been derelict as hell in this whole thing. My naivete and unfamiliarity with court proceedings—it's not your problem—I was under the impression that I had more time than I had with default judgments. I was so ashamed that I had allowed it to go by default. I tried to figure out what I was going to do on this—I didn't realize it could go to final judgment so quickly.

L: It was filed back in March—like 8 months ago.

B: What can I do?

L: I don't know—it's final.

B: Is there any way it can be opened or anything done about it? What is that thing about ordering execution—the telegram said something about ordering execution—what is that?

L: That means that if the judgment isn't paid we will have to execute on ITT's property in Missouri or if there isn't enough here, we will have to go to Hartford or New York or wherever we can find anything—if there's realty, record a levy and order it sold until it is paid.

B: What physically happens? What have you done or what do you do?

L: All we have to do is take a certified copy of our judgment out to the Sheriff and provide him with a legal description of the real estate that ITT owns in that County and he sells it lock, stock and barrel and we can bid up to the amount of our judgment with interest and court costs until it is paid. If nobody else bids, then we take the property.

It is beyond the point where anything can be done about it. My suggestion would be if you are going to do anything about it—as you know there is nothing you can do—would be to employ local counsel down here.

B: Just as a professional courtesy may I beg of you to hold off on it.

L: When will you do something?

B: I will call right now and give you the particulars.

L: We are not going to execute on anything today.

B: It said something in the thing "we have ordered execution."

L: The Circuit Court that has issued the judgment has written up an execution on the judgment—we have not proceeded to enforce the execution as of yet.

B: I can see your side—I guess I screwed up but good.

Right now I suppose I am thinking of two things—I have been much too cavalier and secondly, I am probably going to lose my job.

L: What can I say—I'm sorry.

B: Let me try to make a few calls—I have the name of a few outfits—I'll see if I can get one. Could I then be back to you? What time are you in until today?

L: If I am not in, somebody will know where to reach me.

Conversation ended at 2:20 P.M.

In the Circuit Court of the City of St. Louis
State of Missouri

Lester L. Fulton, Plaintiff, vs. International Telephone and Telegraph Corporation, Defendant.	No. 36962 Div. No. 1

Affidavit

State of Missouri } ss.
City of St. Louis }

Ross G. Lavin, first being duly sworn on his oath states:

1. That he is a practicing attorney licensed in the State of Missouri and a partner in the law firm of Aubuchon & Lavin with offices at 705 Olive Street, St. Louis, Missouri.

2. That on November 9, 1973, at approximately 2:10 P.M., he received a telephone call from a man who identified himself as one Robert Bucci; that he instructed his associate, Daniel C. Aubuchon, and his secretary, Mrs. Jo Ann Saputo, to listen to said conversation; that this conversation was taken down in shorthand and thereafter transcribed by Mrs. Jo Ann Saputo; that he has reviewed the transcription of this conversation as contained in Answer of Plaintiff to Defendant's First Amended Petition to Set Aside Judgment, Quash Execution and Petition for Review and that to the best of his knowledge, recollection and belief this transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri this 5th day of February, 1974.

/s/ ROSS G. LAVIN

Subscribed and sworn to before me this 5th day of February, 1974.

/s/ MARGE ROSEMANN
Notary Public

My term expires: October 28, 1977.

In the Circuit Court of the City of St. Louis
State of Missouri

Lester L. Fulton, Plaintiff, vs. International Telephone and Telegraph Corporation, Defendant.		No 36962 Div. No. 1

Affidavit

State of Missouri } ss.
City of St. Louis }

Daniel C. Aubuchon, first being duly sworn on his oath, states:

1. That he is a practicing attorney licensed in the State of Missouri employed in the law firm of Aubuchon & Lavin with offices at 705 Olive Street, St. Louis, Missouri.

2. That on November 9, 1973 at approximately 2:10 P.M., at the request of Ross G. Lavin, he listened to a telephone conversation between Mr. Lavin and a man who identified himself as one Robert Bucci; that this conversation was taken down in shorthand and thereafter transcribed by Mrs. Jo Ann Saputo, secretary to Mr. Lavin; that he has reviewed the transcription of this conversation as contained in Answer of Plaintiff to Defendant's First Amended Petition to Set Aside Judgment, Quash Execution and Petition for Review and that to the best of his knowledge, recollection and belief this transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri this 5th day of February, 1974.

/s/ DANIEL C. AUBUCHON

Subscribed and sworn to before me this 5th day of February, 1974.

/s/ MARGE ROSEMANN
Notary Public

My term expires: October 28, 1977.

(Seal)

APPENDIX E

Missouri Court of Appeals
St. Louis District

Lester L. Fulton,
Respondent-Plaintiff,
vs.
International Telephone and Telegraph Corporation,
Appellant-Defendant.

No. 36090.

Motion to Dismiss Appeal

Comes now Respondent-Plaintiff and moves for the dismissal of Appellant-Defendant's Appeal, and as grounds therefor, states as follows:

1. This Court is wholly lacking jurisdiction over Appellant-Defendant's Appeal for the reason that Appellant-Defendant has failed to comply with the provisions of Rule 81.07, Missouri Rules of Civil Procedure, which said Rule permits the granting of a Special Order to File an Appeal Out of Time ". . . upon a showing by affidavit or otherwise, that there is merit in the Appellant's claim for the Special Order and that the delay was not due to Appellant's culpable negligence."

2. This Court abused its discretion in granting Appellant-Defendant a Special Order to file an Appeal Out of Time, particularly in view of the Record of the proceedings in this matter in the Circuit Court, as attached to Suggestions filed by both parties relative to Appellant-Defendant's Motion for a Special Order to File an Appeal Out of Time.

3. If this Motion is overruled, Respondent-Plaintiff will have been denied due process of law and deprivation of property rights, all in violation of the Constitutions of both the United States of America and the State of Missouri by reason of having to file briefs and paying expenses of counsel to pursue the Appeal.

4. If this Motion is overruled, this Court will be in derogation of its own Rules, in such a manner and to such an extent that it will be accepting jurisdiction over that which it clearly does not have.

Wherefore, Respondent-Plaintiff prays that in the interest of justice and in the interests of giving the Missouri Rules of Civil Procedure some meaning, that the Court dismiss Appellant-Defendant's Appeal or, in the alternative, grant to Respondent-Plaintiff and Appellant-Defendant the opportunity of oral argument of this Motion at any time that may be convenient with the Court.

Respectfully submitted

/s/ AUBUCHON & LAVIN
705 Olive Street, Suite 1314
St. Louis, Missouri 63101
Attorneys for Respondent-Plaintiff, Lester L. Fulton

Certificate of Service

The undersigned hand delivered a copy of this Motion to the office of the attorneys for Appellant-Defendant, on this 4th day of April, 1974, at 1:30 o'clock P.M.

/s/ DAVID C. AUBUCHON

Missouri Court of Appeals
St. Louis District

Lester L. Fulton,
Respondent-Plaintiff
vs.
International Telephone and Telegraph Corporation,
Appellant-Defendant
No. 36090

Suggestions

Comes now Respondent-Plaintiff, Lester L. Fulton, and respectfully offers the following Suggestions in Support of his Motion to Dismiss Appellant-Defendant's Appeal.

In order to assist the Court, Respondent-Plaintiff sets out in Respondent-Plaintiff's Appeal Exhibit "A", attached hereto, the chronology of events from the commencement of the cause of action to the aforesaid matters currently before this Court.

Under Rule 81.07, Missouri Rules of Civil Procedure, it is incumbent upon the Appellant-Defendant in its Motion for a Special Order to File an Appeal Out of Time, by affidavit and otherwise, to show that it was not guilty of "culpable negligence" in its delay in filing a Notice of Appeal. It is interesting to note that in this respect Appellant-Defendant, in its Suggestions in Support of its Motion for a Special Order, sets out all of the work and haste with which it had handled this matter *only after* the matter had been referred to local counsel. No mention is made of the "attention, diligence and perseverance" exercised by the Appellant-Defendant after it was served with this suit on March 16, 1973, and until the matter was referred to local counsel on November 10, 1973. The chronology of

events referred to above shows that Respondent-Plaintiff's attorney sent a certified letter to Appellant-Defendant's house counsel on June 5, 1973, notifying him that a default would be sought unless a responsive pleading was filed within ten (10) days. After the default hearing on June 28, 1973, the Court below saw fit to take the matter under submission and on September 19, 1973, entered its unusual memorandum that on September 28, 1973, the Court intended to enter a judgment for $21,000 actual and $75,000 punitive damages and had the Clerk send a copy of his Order of that date to the home office of the Appellant-Defendant and they acknowledged receiving this on October 1, 1973. Thereafter, the Court entered the judgment on September 28, 1973, and had the Clerk again send a copy of the Order entering the judgment to the home office of the Appellant-Defendant and they acknowledged receiving it on October 2, 1973. Yet, no effort was made during all that time to file a responsive pleading, to file a motion to set aside the judgment, to file a notice of appeal, or to enter appearance of any kind, or to refer the matter to local counsel until Respondent-Plaintiff wired the Appellant-Defendant on November 9, 1973, that they intended to go forward with an execution and levy on the judgment they had procured. Only then did the Appellant-Defendant galvanize itself into action by employing local counsel.

Appellant-Defendant produced at the hearing on its First Amended Motion to Set Aside Judgment one Mr. Robert Bucci, house counsel for the Appellant-Defendant. His testimony convicts the Appellant-Defendant of culpable negligence in not following the Rules of this Court. A copy of his testimony taken by the Court Reporter, previously filed herein and marked Plaintiff's Appeal Exhibit No. 1, without any measure of doubt, proves the procrastination, neglect, unreasonable inattention and inactivity, lack of diligence and most importantly, culpable negligence, of the Appellant-Defendant.

If ever a witness convicted his client of extreme culpable negligence, Mr. Bucci's testimony should resolve any doubt in this respect.

Incidentally, while a client is bound by the negligence of his attorney, it is to be remembered that Mr. Bucci was not even an independent attorney but was a full-time employee or house counsel for the Appellant-Defendant. The Courts in this State have consistently held that the negligence of the attorney is chargeable to the client.

Casper v. Lee, 245 S.W. 2d 132 (Mo. Sup. Ct. en banc, 1952). A default judgment was taken, but a motion to vacate and set aside the default, filed more than thirty days after the entry of the judgment, was sustained. Defendant's lawyer had failed to file a pleading. The Supreme Court held that the defendant was chargeable with the negligence of his lawyer in permitting a default judgment to be entered. The Court reversed the order setting aside the judgment and reinstated the judgment.

In Interest of R., et al., 362 S.W. 2d 642 (Springfield Ct. App., 1962). In this case notice of appeal on a judgment was filed exactly sixty days after the rendition thereof, when the then controlling statute called for a thirty-day period. The Springfield Court of Appeals held that they could not enlarge the period within which an appeal may be taken. The timely filing of notice of appeal is the "vital step" and an "essential prerequisite" to appellate jurisdiction. "The negligence of an attorney is the negligence of his client . . . as was settled at an early date and has been demonstrated in innumerable cases . . . we have no alternative other than to dismiss the appeal." l.c. 644.

The Rules of Civil Procedure refer to "culpable negligence". Appellant-Defendant, in its Suggestions, previously referred to, seeks to define culpable negligence by citing a case involving

criminal procedure in the State of Missouri. The writers have been unable to find a definition of culpable negligence in any civil case in Missouri, but both Black's Law Dictionary and Corpus Juris Secundum define the words as follows:

> Black's Law Dictionary, Fourth Edition, 1951, defines the word "culpable":
>
> > "*Culpable*. Blamable; censurable; involving the breach of a legal duty or the commission of a fault. The term is not necessarily equivalent to 'criminal', for in present use, and notwithstanding its derivation, it implies that the act or conduct spoken of is reprehensible or wrong but not that it involves malice or a guilty purpose. 'Culpable' in fact connotes fault rather than guilt."
>
> Corpus Juris Secundum, Volume 25, Page 28 through and including Page 30, defines the phrase "culpable neglect":
>
> > "*Culpable Neglect*. Any neglect that is censurable; blameworthy; the neglect which exists when the loss can fairly be ascribed to one's own carelessness, improvidence, or folly; failure to make reasonable inquiry. . . . It is a culpable want of watchfulness and diligence, unreasonable inattention and inactivity; the lack of due diligence; . . . where a party loses a right through his own carelessness rather than through the fault of another."

Certainly, Mr. Bucci's testimony regarding inaction and delay of the Appellant-Defendant herein, come so far within the purview of the above definitions that there should be no doubt in the minds of this Court that Appellant-Defendant cannot bring itself within Rule 81.07, Missouri Rules of Civil Procedure, to secure this special relief reserved for blameless and meritorious defendants who, through no fault of their own, have been defrauded of their rights. If there can be any doubt remaining

as to Appellant-Defendant's culpable negligence, Respondent-Plaintiff attaches herewith as exhibits (Respondent-Plaintiff's Appeal Exhibits Nos. B-1, B-2 and B-3, respectively) the Affidavits of Ross G. Lavin and Daniel C. Aubuchon, two of the attorneys for Respondent-Plaintiff, and Mrs. JoAnn Saputo, secretary to the aforesaid attorneys, relative to a telephone conversation between Mr. Robert Bucci and Mr. Ross G. Lavin, on November 9, 1973, when the time to appeal had expired. Clearly, Mr. Bucci's complete lack of any affirmative action, indeed his complete inaction, can only be characterized as a "reckless disregard of the consequences of his omission" to do something. Or, in simple language, culpable negligence.

Previously filed herein, Plaintiff's Appeal Exhibit No. 2, is the Opinion of Judge Buder in overruling Defendant's First Amended Motion to Set Aside the Default Judgment and to Quash the Execution Issued. Same thoroughly exposes the Appellant-Defendant's culpable negligence in completely ignoring the law, rules and procedure of the State of Missouri.

Finally, Respondent-Plaintiff respectfully contends that because this Court has violated its own Rules in granting Appellant-Defendant's Motion for a Special Order, Respondent-Plaintiff will lose the benefit of his judgment, if even for a relatively brief interval, can never be restored whole, and will incur expenses relative to the appeal, all of which is a violation of due process of law in violation of Respondent-Plaintiff's rights guaranteed to him by the Constitution of the United States of America and State of Missouri, and all of which would be unnecessary if this Court would recognize that it cannot accept jurisdiction over that which it clearly and unequivocally does not possess.

Conclusion

Respondent-Plaintiff respectfully submits that Appellant-Defendant's Appeal be dismissed:

First: Because this Court lacks jurisdiction over the Appeal;

Second: Because the Record of this case and the testimony of Appellant-Defendant's own witness convicts it of procrastination, neglect, unreasonable inattention and inactivity, lack of diligence and most importantly, culpable negligence;

Third: Because to permit an appeal in this situation, where this Court has ignored its Rules and assumed jurisdiction when it clearly cannot do so, violates the due process clauses of the Constitution of the United States of America and State of Missouri.

Respectfully submitted

/s/ AUBUCHON & LAVIN
705 Olive Street, Suite 1314
St. Louis, Missouri 63101
621-1575
Attorneys for Respondent-Plaintiff, Lester L. Fulton

Certificate of Service

The undersigned hand delivered a copy of these Suggestions to the office of the attorneys for the Appellant-Defendant, on this 4th day of April, 1974, at 1:30 o'clock P.M.

/s/ DANIEL C. AUBUCHON

Chronology of Events

1973

Mar. 15 Petition filed—Circuit Court, City of St. Louis, Missouri.

Mar. 16 Defendant served. (Personal Service on Defendant's Registered Agent, C. T. Corporation System).

June 5 Certified Letter to Defendant advising that a default would be taken unless Defendant entered its appearance or filed a pleading within ten (10) days.

June 7 Return Receipt relative to the aforesaid Certified Letter.

June 18 Default and Inquiry Granted.

June 28 Hearing on Default. Filing of Memorandum of Law and Facts.

Sept. 19 Interim Order of Court indicating judgment to be entered against Defendant on September 28, 1973.

Sept. 26 Memo from Court to Defendant indicating action to be taken on September 28, 1973. (This was postmarked to Defendant on September 26, 1973, and included the actual amount of the judgment to be entered. This memo was received by Defendant on October 1, 1973).

Sept. 28 Judgment entered—$21,000 actual and $75,000 punitive damages. Memo from Court to Defendant showing actual judgment entered. This was received by Defendant on October 2, 1973.

Nov. 9 Telegram from Plaintiff's attorney to Defendant advising them of issuance of execution and intention to levy if judgment were not paid.

Nov. 14 Defendant's Motion to Set Aside Judgment, Quash Execution and Petition for Review filed.

1974

Feb. 4 Defendant's First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review filed.

Feb. 7 Hearing on Defendant's First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review.

Feb. 20 Defendant's First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review overruled. Court's opinion in this respect is hereto attached and marked Plaintiff's Appeal Exhibit No. 2.

Mar. 1 Defendant's Notice of Appeal to Supreme Court of Order overruling Defendant's First Amended Motion to Set Aside Judgment and to Quash Execution, and Petition for Review.

Mar. 8 Defendant's Motion for Special Order to File a Notice of Appeal Out of Time filed with Missouri Supreme Court.

Mar. 18 Order of Missouri Supreme Court transferring Appellant-Defendant's Motion to the Missouri Court of Appeals, St. Louis District.

Mar. 21 Receipt by St. Louis Court of Appeals of transcript and exhibits from Missouri Supreme Court.

Mar. 21 Granting by St. Louis Court of Appeals of Appellant-Defendant's said Motion.

Missouri Court of Appeals
St. Louis District

Lester L. Fulton,
Respondent-Plaintiff,
vs.
International Telephone and Telegraph Corporation,
Appellant-Defendant.
No. 36090

Affidavit

State of Missouri
City of St. Louis } ss

Ross G. Lavin, first being duly sworn on his oath, states:

1. That he is a practicing attorney licensed in the State of Missouri and a partner in the law firm of Aubuchon & Lavin with offices at 705 Olive Street, St. Louis, Missouri.

2. That on November 9, 1973, at approximately 2:10 P.M., he received a telephone call from a man who identified himself as one Robert Bucci; that he instructed his associate, Daniel C. Aubuchon, and his secretary, Mrs. Jo Ann Saputo, to listen to said conversation; that this conversation was taken down in shorthand and thereafter transcribed by Mrs. Jo Ann Saputo; that he has reviewed the transcription of this conversation as contained in Respondent-Plaintiff's Appeal Exhibit No. B-3, and that to the best of his knowledge, recollection and belief this transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri, this 13th day of March, 1974.

/s/ ROSS G. LAVIN

Subscribed and sworn to before me this 13th day of March, 1974.

/s/ (Illegible)
Notary Public

My term expires: May 28, 1976.

Missouri Court of Appeals
St. Louis District

Lester L. Fulton,
Respondent-Plaintiff,
vs.
International Telephone and Telegraph Corporation,
Appellant-Defendant.
No. 36090

Affidavit

State of Missouri
City of St. Louis } ss

Daniel C. Aubuchon, first being duly sworn on his oath, states

1. That he is a practicing attorney licensed in the State of Missouri employed in the law firm of Aubuchon & Lavin with offices at 705 Olive Street, St. Louis, Missouri.

2. That on November 9, 1973, at approximately 2:10 P.M., at the request of Ross G. Lavin, he listened to a telephone conversation between Mr. Lavin and a man who identified himself as one Robert Bucci; that this conversation was taken down in shorthand and thereafter transcribed by Mrs. Jo Ann Saputo, secretary to Mr. Lavin; that he has reviewed the transcription of this conversation as contained in Respondent-Plaintiff's Ap-

peal Exhibit No. B-3, and that to the best of his knowledge, recollection and belief this transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri, this 13th day of March, 1974.

DANIEL C. AUBUCHON

Subscribed and sworn to before this 13th day of March, 1974.

(Illegible)
Notary Public

My term expires: (Illegible).

Missouri Court of Appeals
St. Louis District

Lester L. Fulton, Respondent-Plaintiff, vs. International Telephone and Telegraph Corporation, Appellant-Defendant.	}	No. 36090

Affidavit

State of Missouri }
City of St. Louis } ss

Jo Ann Saputo, first being duly sworn on her oath, states:

1. That she is a legal secretary employed by the law firm of Aubuchon & Lavin located at 705 Olive Street, St. Louis, Missouri, and has been so employed since August, 1964.

2. That on November 9, 1973, at approximately 2:10 P.M., at the request of Mr. Ross G. Lavin, she listened to a telephone conversation between Mr. Lavin and a man who identified himself as one Robert Bucci, and took shorthand notes thereof; that thereafter she transcribed said notes and a transcription thereof is attached hereto, marked Exhibit A, and to the best of her knowledge, recollection and belief the transcription is true, correct and accurate in every detail.

Further affiant sayeth not.

Dated at St. Louis, Missouri, this 13th day of March, 1974.

/s/ JO ANN SAPUTO

Subscribed and sworn to before me this 13th day of March, 1974.

/s/ (Illegible)
Notary Public

My term expires: May 28, 1976.

"*Bucci:* I just received a call from Western Union—telegram over the phone on matter of Fulton v. ITT about final judgment. I guess I have been derelict as hell in this whole thing. My naivete and unfamiliarity with court proceedings—it's not your problem—I was under the impression that I had more time than I had with default judgments. I was ashamed that I had allowed it to go by default. I tried to figure out what I was going to do on this—I didn't realize it could go to final judgment so quickly.

Lavin. It was filed back in March—like 8 months ago.

Bucci: What can I do?

Lavin: I don't know—it's final.

Bucci: Is there any way it can be opened or anything done about it? What is that thing about ordering execution—the telegram said something about ordering execution—what is that?

Lavin: That means that if the judgment isn't paid we will have to execute on ITT's property in Missouri or if there isn't enough here, we will have to go to Hartford or New York or wherever we can find anything—if there's realty, record a levy and order it sold until it is paid.

Bucci: What physically happens? What have you done or what do you do?

Lavin: All we have to do is take a certified copy of our judgment out to the Sheriff and provide him with a legal description of the real estate that ITT owns in that County and he sells it lock, stock and barrel and we can bid up to the amount of our judgment with interest and court costs until it is paid. If nobody else bids, then we take the property. It is beyond the point where anything can be done about it. My suggestion would be if you are going to do anything about it—as you know there is nothing you can do—would be to employ local counsel down here.

Bucci: Just as a professional courtesy may I beg of you to hold off on it.

Lavin: When will you do something?

Bucci: I will call right now and give you the particulars.

Lavin: We are not going to execute on anything today.

Bucci: It said something in the thing "we have ordered execution."

Lavin: The Circuit Court that has issued the judgment has written up an execution on the judgment—we have not proceeded to enforce the execution as of yet.

Bucci: I can see your side—I guess I screwed up but good. Right now I suppose I am thinking of two things—I have been much too cavalier and secondly, I am probably going to lose my job.

Lavin: What can I say—I'm sorry.

Bucci: Let me try to make a few calls—I have the name of a few outfits—I'll see if I can get one. Could I then be back to you? What time are in you in until today?

Lavin: If I am not in, somebody will know where to reach me."

In the Circuit Court of the City of St. Louis
State of Missouri

Lester L. Fulton, Plaintiff, vs. I. T. & T. Corporation, Defendant.		Cause No. 36962-F. Div. No. 1.

Testimony of: Robert A. Bucci

February 7, 1974.

Reported by: Edsel E. Colvin, C.S.R.

In the Circuit Court of the City of St. Louis
State of Missouri

Lester L. Fulton, Plaintiff, vs. I. T. & T. Corporation, Defendant.		Cause No. 36962-F. Div. No. 1.

Be It Remembered, the above-entitled cause came on for oral proceedings before Hon. William E. Buder, Chief Judge, presiding in Division No. 1, of the Circuit Court of the City of St. Louis, State of Missouri, on Thursday, February 7, 1974, and the following testimony was given by Robert A. Bucci.

For the Plaintiff:	Ross G. Lavin, Esq.
Respondent:	705 Olive Street
For the Defendant:	James Herron, Esq.
Movant:	611 Olive Street.

[*1] PROCEEDINGS

* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

Robert A. Bucci,
was sworn by the Clerk, and testified as follows:

Direct Examination

Q. State your name for the Court, please? A. Robert A. Bucci.

Q. Where do you reside? A. 12 Washburn Drive, "Simberry" Connecticut.

Q. What is your occupation? A. Attorney.

Q. For whom? A. I. T. I. Communications, Equipment and Systems Division.

Q. Is that the same division by which Mr. "Leach" is employed? A. Yes, sir.

Q. How long have you been an attorney for the C.E.S., Division of I. T. & T.? A. Since July, 1972.

Q. Are you a graduate of a law school? A. Yes, sir.

Q. What law school is that? A. Foreham Law School.

Q. What year? A. 1965.

[2] Q. And are you licensed to practice in the State of Connecticut? A. No.

Q. What states? A. New York in 1966; Massachusetts, 1969.

Q. Are you licensed to practice law in the State of Missouri? A. No, sir.

Q. Have you ever been? A. No, sir.

Mr. Herron: Would you mark these, please?

(Whereupon, the Court Reporter marked Movant's Exhibit Nos. 1 through 17, for identification.)

Q. (By Mr. Herron) Mr. Bucci, when did you first become aware that a lawsuit had been filed against the International Telephone and Telegraph Corporation, your employer, by Mr. Fulton? A. It would have been some time in March. I believe they filed suit around the 14th—14th, within the following week, twenty something, or 26th or 25th, maybe.

Q. Ill show you what has been marked for identification purposes as Movant's Exhibit No. 11, which also bears the designation of Plaintiff's Exhibit 26-28, '73, and ask you to look at that document. Have you seen that document **[3]** prior to today? A. Yes.

Q. When do you recall first seeing this document? A. That would have been shortly after it was sent, whenever it was delivered.

Q. What date is on the document?

The Court: Excuse me. We will have a short recess.

(Whereupon, a short recess was had.)

The Court: You may proceed. Are you ready Mr. Aubuchon?

Mr. Aubuchon: Yes, Your Honor.

The Court: Are you ready, Mr. Herron?

Mr. Herron: Yes, Your Honor.

Q. (By Mr. Herron) Mr. Bucci, I'll direct your attention again to Exhibit No., movant's Exhibit No. 11. I believe your testimony was that you did receive that communication? A. Yes, probably a few days after it was sent.

Q. It makes reference to some conversation that you had had prior to that time with Mr. Lavin,——

The Court: What is the date of that, sir?

Mr. Herron: April 8, 1973, Your Honor.

[4] Q. (By Mr. Herron) Do you recall that you had a conversation prior to that time with Mr. Lavin? A. Yes, 25th, 26th of March, if my memory serves me.

Q. A week or two from the time you were initially served with a summons? A. It would have been within the first day or two that I got the thing. It was received through the corporate trust and went to New York Headquarters office and by the time it worked out to my division it was probably a week to ten days later.

Q. I'll show you what has been marked for identification purposes as Movant's Exhibit No. 3. Are you the author of that piece of correspondence? A. Yes, sir, I am.

Q. To whom is it directed? A. Mr. Lavin.

Q. What is the date? A. April 30, 1973.

Q. Mr. Bucci, what experience have you had in the field of litigation? A. Meaning trying cases?

Q. Trial work, yes? A. I have tried one case, a small claim case.

Q. One small claim case?

[5] Mr. Aubuchon: If Your Honor please, I dont know the purpose of extensive litigation experience and I don't think it has a purpose in the record except to prolong it.

The Court: What is the purpose of this?

Mr. Herron: Well, I wanted to bring before the Court this man's experience in the practice of law and what he would know about time periods and things of this sort.

The Court: I know, but Mr. Herron, aren't we getting away, far afield. Now, with all due respect to you and the attorney, and I'm not critical, but here's one of the largest corporations in the United States duly served with a notice, and you get to

their home office, and you're trying to tell me that this man has no experience,—now, that's not critical. I know many good lawyers have no trial experience, but the point is, the corporation is charged with knowledge of legal process and they certainly had trial lawyers, and the fact that this man,—and understand I'm not, I don't mean,—I'm not criticizing you,—but you mean to tell me you're setting up a defense that he was unqualified to pass on this thing or had no experience?

Mr. Herron: Your Honor, I'm trying to bring before the Court the fact exactly who this man is and put that in perspective.

Mr. Aubuchon: You already told us he's a lawyer.

[6] The Court: I have nothing against him. I don't know that he's chargeable with anything.

Q. (By Mr. Herron) Mr. Bucci, I'll show you what has been marked—identified as Movant's Exhibit 4, and I'd ask, would ask you, sir, if you received that correspondence? A. Yes, I did, on or about the date indicated on the correspondence.

Mr. Aubuchon: What is the exhibit number, Jim?

The Witness: June——

Mr. Herron: Exhibit 4.

Q. (By Mr. Herron) Now, then the date on this document, Exhibit 4, is what? A. The date it was sent, June 5th, 1973.

Q. Now, I'll show you what has been marked for identification purposes as Movant's Exhibit No. 14, and ask you, sir, are you the author of the document? A. Yes, I am.

Q. And to whom is that document directed? A. Mr. Lavin.

Q. And you mailed that letter dated June 29th, 1973? A. Yes.

Q. Now, at the time that you mailed that document, Exhibit No. 14, had you had any communication, written or oral, with

Mr. Lavin or anybody in his office during the **[7]** interim from the time you had received exhibit 4 until the time that you mailed exhibit numbered 14? A. In other words, between June 5th and June 29th?

Q. That's right, of 1973? A. I don't recall any to be honest with you.

Q. I'll show you what has been marked for identification purposes as Movant's Exhibit No. 15. Did you receive that document in the mail? A. Yes, I did.

Q. When did you receive it? A. I would assume a few days after it was mailed.

Q. Was that in response to the document that you had authored June 29th, Exhibit 14? A. It would seem to me that it was.

Q. Now, did Mr. Aubuchon, the purported author of Exhibit 15, did he include in that letter——

Mr. Aubuchon: I don't know what he's asking did I include in that letter. The letter speaks for itself.

The Court: Just a second. The objection will be sustained.

Q. (By Mr. Herron) Did you receive with this letter, Exhibit 15, and copy of this document entitled Memorandum in Support of Plaintiff's Hearing on Default and Inquiry, June 28, 1973? A. Yes.

[8] Did receive any copy of a document along with that letter indicating that an Interlocutory decree——

Mr. Aubuchon: If Your Honor please, I don't know the reason for the question.

The Court: The objection will be sustained as to the letter, but he can ask whether or not he received anything else other than the letter.

Q. (By Mr. Herron) In this envelope which the letter came in,——

The Court: What he's asking, were there any enclosures with Exhibit No. 15?

The Witness: No.

Q. (By Mr. Herron) Now, from that date—strike that, if you please. Prior to that date, prior to the date that you received Exhibit 15, had you received any copy of that memorandum that I just called your attention to? A. No.

Q. Or any document indicating that an interlocutory decree of default had been entered? A. No.

Q. Now, let's take the period after you received Exhibit 15,——

Mr. Aubuchon: Tell me what Exhibit 15 is?

The Witness: It's a letter from Michael Aubuchon **[9]** to I. T. & T.

Mr. Aubuchon: Go ahead.

Q. (By Mr. Herron) Dated July 2. After that date, and until you received—well, after that date and up to October 1 of 1973, after the time you received Exhibit 15, and all the way up to the time, October 1, 1973, did you receive any copies of that memorandum in support of the plaintiff's hearing on default-inquiry? A. No.

Q. Did you receive anything during the period, any document, correspondence of any sort indicating that an interlocutory decree of default had been entered? A. No.

Q. Or that a final judgment was being entered? A. No.

Q. Did you receive any certificate of the verbal communication from Mr. Aubuchon, Mr. Lavin, or anybody else in that office concerning any, during this period, July 2, on up to October 1, 1973, concerning the action they had taken in taking an interlocutory decree of default, or in filing this memorandum in support of plaintiff's hearing on default-inquiry?

Mr. Aubuchon: Your Honor. I have to object to whether they received any communication from me as **[10]** being outside the perview of this inquiry here. You already ruled on the memorandum.

The Court: Well, I ruled that he could, that the letter speaks for itself, but isn't there a case where it has been decided after a person has been served with process and service is valid that there is no further obligation to notify?

Mr. Aubuchon: Judge, there are many cases to that effect.

The Court: I don't know about how many, but——

Mr. Herron: We plead in the First Amended Motion that when Mr. Bucci received Exhibit 15.

The Court: The only basis on which this could be offered, as I see it, is fraud or misrepresentation.

Mr. Herron: That is the pleading.

The Court: It will be admitted subject to the objection. Read the question back.

(Whereupon, the Court Reporter read the last question in evidence, which is as follows:

"Q. Did you receive any certificate of the verbal communication from Mr. Aubuchon, Mr. Lavin, or anybody else in that office concerning any, during this period, July 2, on up to October 1, 1973, concerning the action they had taken in taken an interlocutory decree of default, or in filing this memorandum in support of **[11]** plaintiff's hearing on default-inquiry?")

The Witness: Shall I answer it?

The Court: Yes.

The Witness: No, sir.

Q. (By Mr. Herron) I'll show you what has been marked for identification purposes, Movant's Exhibit—you'll have to——

(Whereupon, the Court Reporter marked Movant's Exhibit No. 18, for identification.)

Q. (By Mr. Herron) I'll show you what has been marked defendant's Exhibit—Movant's Exhibit No. 18, and Movant's Exhibit No. 16, and ask if you can identify those two exhibits for the Court? A. Yes, I can.

Q. And what are they? A. The first exhibit is a Memorandum for Clerk, dated September 19, 1973. This cause called. Plaintiff appears.

Q. What is the other exhibit? A. Exhibit 16?

The Court: Read the whole exhibit. It's a short one, Mr. Bucci, please, sir.

The Witness: Memorandum for Clerk, September 19, 1973. Cause called. Plaintiff appears. Although called thrice, defendant appears not and remains in default. Upon testimony and evidence previously heard and adduced, the Court **[12]** will rule as follows: On September 28, 1973, Judgment and finding of court in favor of plaintiff on Count I in the sum of $21,000.00 and costs. Judgment and finding of the Court in favor of plaintiff on Count II, in the sum of $75,000.00 as punitive damages.

Filed. Signed by Michael J. Scott, Judge.

Filed September 19, 1973, by Joseph P. Roddy, Clerk.

The Court: Could I see that a minute, sir?

Well, you got this then after the letter from Mr. Aubuchon. Where is that letter? This is the letter marked Exhibit C, June 2, '73, addressed to you, Mr. Bucci?

The Witness: July 2——

The Court: July 2 is the date of the letter, but you, you have, you got the letter prior to the memorandum?

The Witness: Yes.

The Court: Well, at that time, then, there was no Interlocutory Judgment or Default Judgment, was there?

Mr. Herron: Your Honor, I think the record will show that June 13th, the initial default-inquiry was granted Hearing was then on damages.

The Court: There was no judgment, though.

Mr. Herron: There was default-inquiry entered.

The Court: I don't think there is obligation in a **[13]** case like this. I don't know, but at that time it was just a default and inquiry. There was no judgment.

Mr. Aubuchon: That's correct. That's the first communication from the Court after the hearing on default.

Mr. Herron: As I understand the law, an interlocutory decree of default, the question of liability is settled at the finding of the default-inquiry and then the damage inquiry follows.

In this instance, both of those proceedings had pre-dated the July 2nd letter. The minute entries in the file in this case will indicate, I believe, that June 13th is the date, right, June 13th, 1973, default-inquiry granted.

The Court: But no judgment.

Mr. Herron: Just an interlocutory Judgment as I understand it, and the result that occurred at that time has that effect.

Mr. Aubuchon: Judge I do not agree with his——

The Court: I didn't enter the judgment. Judge Scott didn't enter the judgment on December 19th. He said he would enter it on the 28th, is that correct?

Mr. Herron: That's right.

Q. (By Mr. Herron) I'll hand you Movant's Exhibit No. 16 and ask you what that is? A. An envelope in which the last exhibit came to me.

Q. Exhibit 18 came to you? **[14]** A. Yes.

Q. Would you tell the Court what is post-marked as Exhibit 16, the envelope, the post-mark? A. The 26th of September, 1973.

Q. When did you actually receive that envelope with its contents, Exhibit 18? A. Physical received it, to open it, on October 1st, 1973, which would be Monday.

Q. I'll show you what has been marked for identification purposes as Movant's Exhibit No. 17, and ask if you received that exhibit? A. Yes, I did.

Q. When did you receive that? A. The following day, on Tuesday, October 2nd.

Q. And the date on that exhibit is what? A. September 28, 1973.

Q. And it's actually recorded, entry judgment? A. Yes. Record judgment and finding on two counts.

The Court: What is that date?

The Witness: September 28, 1973.

The Court: That was the entry of the judgment itself?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Herron) To back up a moment, directing your **[15]** attention to, again to Movant's Exhibit 14, which you testified you sent to Ross Lavin, Movant's Exhibit 15, and you testified that you received that back in response to Exhibit 14, is that right? A. Yes, sir.

Q. What, if any reaction did you have to Exhibit No. 15?

Mr. Aubuchon: If your Honor please,——

The Court: Sustained. Sustained.

Q. (By Mr. Herron) What, if any conclusion did you reach on the basis of Exhibit 15?

Mr. Aubuchon: Your Honor, the same objection.

The Court: Sustained.

Mr. Herron: Your Honor, I'd like to make an offer of proof in the record. The witness if allowed to answer that question, his testimony would be,——

Mr. Aubuchon: Your Honor. There is another way getting it.

The Court: Make your offer of proof.

Mr. Herron: ——would be that he concluded from Exhibit No. 15, that the action threatened in Exhibit No. 4, had, in fact, not occurred, and had been withdrawn. I think this is relevant.

The Court: Is there an objection to it?

Mr. Aubuchon: Well, which letter is he referring to, Judge?

The Court: He's referring in his offer of proof **[16]** to the conclusion of this witness.

Mr. Aubuchon: Because of these two letters?

Mr. Herron: These three letters.

Mr. Aubuchon: Of course I object, most strenuously, Judge.

The Court: Sustained.

Q. (By Mr. Herron) Directing your attention again to Movant's Exhibit No. 4, and I'll ask you, Mr. Bucci, when did you become aware that the plaintiff's attorney had taken the action threatened in Exhibit No. 4? A. On October 1 when I received the first, the piece of correspondence from the court dated September 29th—which exhibit is that?

Q. Exhibit 18? A. Yes.

Q. Which you testified you received on October 1st? A. Yes, right.

Q. Do you recall when you employed my law firm, Lewis, Rice, to represent I. T. and T.?

Mr. Aubuchon: If Your Honor please, that has no place in the inquiry.

The Court: I'll let it in subject to your objection. I'd like to know when they employed them, not that I think it's material, but I'd like to know. To be very frank, **[17]** I'm beginning to wonder if it's safe to own I. T. & T. stock, if everything is handled this way. Put that on the record.

Q. (By Mr. Herron) Would you tell His Honor,——

The Court: You can tell the President of your company that I'm not blaming you personally.

Q. (By Mr. Herron) Would you tell His Honor what date you contacted and employed my law firm, Lewis, Rice, Tucker, Allen and Chubb, to represent I. T. & T. in this matter? A. November 9, 1973.

The Court: Had the thirty days expired?

Mr. Herron: Yes.

The Court: All right.

Mr. Herron: I have no further questions of this witness, Your Honor. I wish to offer in evidence,——

The Court: Well, they will all be admitted except to the specific objections which I ruled out. The other matter will be admitted, subject to plaintiff's objections and the Court's reservation of the ruling. Some of them I sustained where they were conclusions or I thought it was clearly outside the record. I considered that.

Mr. Herron: But all other exhibits marked Movant's Exhibits admitted except those specifically——

The Court: Sent to me. Judge Scott went out of **[18]** the way to even notify them. I don't there there was any obligation on him to notify them, and because I. T. & T. sees fit to—Mr. Bucci, who is in no position to handle these things. He's not a Missouri

lawyer, and he knows nothing about Missouri procedure, but to permit this to be accomplished is beyond comprehension to me. If you had some poor ignorant person on the street and not have an education, or no knowledge of the law, and probably had to be lead up to the Legal Aid Bureau, I'd understand some of this, but they are one of the largest corporations, and they were, they certainly had over and above the certification of process, Mr. Herron. They had knowledge and they certainly knew enough about business to know that they would need local counsel, but it's a little hard—be that as it may—I'm not deciding it, but it is——

Mr. Herron: It's our position they had no notice this was——

The Court: Let's get on. I didn't mean to say I've decided it.

Mr. Aubuchon: May I ask a few questions?

The Court: You certainly may. Have you concluded?

Mr. Herron: Yes.

Cross-Examination

By Mr. Aubuchon

Q. Mr. Bucci, to summarize your testimony here today, **[19]** as I understand it, from the date of Mr. Lavin's letter to you on June 5th, up until November 9th, you did exactly nothing about this lawsuit, so far as employing local counsel or doing anything about it? Is that correct? A. As far as employing local counsel, yes. As far as calling, no, because I did during the week of October 1st, some time within the days of October 1st through the 5th, whatever the Friday was, I believe, placed two calls, one for Mr. Lavin and one for Mr. Aubuchon, neither one which was around.

Q. All right. Would a letter notifying that a default would be taken unless a responsive pleading—did you know what a default meant? A. Yes.

Q. And you did nothing about it? A. What time period, sir?

Q. At any time up until now? A. I wrote to him on subsequent exhibits, on July—June 29th.

Q. Saying that you were going to be out of town? A. Right.

Q. To which I responded that, to call me, I was handling the matter? A. That's right.

Q. That was in July? **[20]** A. Yes.

Q. And there was a time period of some several weeks, was there not, between the two letters? A. Yes.

Q. And you still did nothing about it? A. Correct.

Q. And you received these notices from the Court and you still did nothing about it? A. I wouldn't—well, I did not retain counsel.

Q. You did nothing about it, did you? A. I told you I called twice. I called——

The Court: There is no need to belabor this point. Could I ask this?

Examination by the Court

Q. You say you are licensed to practice in Massachusetts. Where is your office located, Connecticut? A. Yes, sir.

Q. Do they have default proceedings in Massachusetts when no answer is filed in a case, Mr. Bucci? A. I guess they would, but I don't know the exact details. I'm sure they would.

Q. You said, I believe, you are also licensed to practice in New York? A. Yes, sir.

Q. Do they have a procedure for default judgments to your knowledge? **[21]** A. Yes, sir.

Q. How large is your office, the legal department, over there? A. Where I work?

Q. Yes? A. One man, me.

Q. Is that the main office? A. No, it's a small division.

Q. Could I have that file? Where is the main legal department of International Telephone and Telegraph Corporation? A. That would be 320 Park Avenue, New York City.

Q. Do they have a legal department? A. Yes, sir.

Q. Why wasn't this directed to their law department rather than you, sir? A. It was initially through the corporate, the papers were initially received through corporate trust, to the 320 Park Avenue address, the secretary's office, and then forwarded via internal route.

Q. Who forwarded it to you? A. I think it came through Attorney John McCord's office.

Q. John McCord's office? **[22]** A. An attorney for I. T. & T.

Q. I want to know how Mr. McCord operates. He sent it on to you in Connecticut, in a one-man office? A. With a letter.

Q. Well, how many lawyers does McCord have down there? A. I just don't—I don't know how many he has, or how many I. T. & T. has down there. I just don't know.

Q. Have you ever been down to that office in New York? A. Yes.

Q. How many would you estimate he had? A. Personally I don't know.

Q. He has more than—let's see. 10 or 12 assistants? A. Well, he's not in charge of the entire legal department.

Q. That's what I'm trying to find out. As far as lawyers, at 320 Park, there's a lot of them? A. Twenty, thirty. I don't know.

Q. I understand, all different types of litigation which concerns a phone company, such as anti-trust suits, franchises, and all those other things, but they certainly would have a litigation section, wouldn't they, aren't most of those New York law offices divided into corporate sections? A. Yes.

Q. Taxation, probate and litigation. That's the primary division into sections, is that not correct? **[23]** A. I would say that's normal procedure. I'm not thoroughly familiar with the breakdown, but they do have certain people who handled those certain specialities.

The Court: Do you have any other questions?

Mr. Aubuchon: Your Honor, I do want to say to young Bucci here, I'm not trying to hurt you, I don't want to hurt any lawyer, but you did have a conversation with Ross Lavin after I wired you about this execution, and the time was along about 2:00 o'clock on Friday, November——

A. November 9th.

(By Mr. Aubuchon)

Q. Do you recall that conversation? A. Yes.

Q. Would you tell the Court what you said and what he said? A. I can just recall the general gist of it without specifics.

Q. Fair enough? A. The general gist, I had received, I think, a Western Union Telegram.

Q. Signed by me? A. Yes, sir.

Q. Saying that judgment was final and entered and that going to execute on property. Please advise whether you intend to satisfy the execution or make—— A. In response to that I placed a call to your office.

[23A] Q. And what did you say? A. I probably said, what's going on, as I came on the phone.

Q. Did you say that you just received a call from Western Union relative to a telegram? A. Yes.

Q. And did you say that I guess I have been derelict as hell in this whole thing? A. Again, I can't remember it word for word.

The Court: Wasn't that the wrong name, derelict. It was negligence, if anything, attributable to the New York office in forwarding it to him.

Mr. Aubuchon: I don't wish to embarrass this boy any further.

The Court: To your knowledge, Mr. Bucci, does International Telephone and Telegraph Corporation have any property in the State of Missouri?

The Witness: Now, yes.

The Court: Yes?

The Witness: Yes.

The Court: Operate in the State of Missouri?

The Witness: Yes.

The Court: Did you say yes?

The Witness: Yes.

[24] The Court: Would you have any estimate as to their holdings?

The Witness: No, sir.

The Court: Are they extensive? What operations do they have here?

The Witness: As far as I know, the major operation, I think it's a subsidiary, not a division as I. T. & T. Blackburn—I don't know what they make.

The Court: It's manufacturing?

The Witness: If I had to guess I would say yes, Your Honor. I'm not sure what the product it.

The Court: All right.

The Witness: They have plants, I believe.

The Court: Where is the plant, do you know?

The Witness: I think—I subsequently found out that it's around the general area of the county.

The Court: In St. Louis County?

Mr. Herron: Yes.

The Court: All right. I have no other questions of this young man.

Mr. Herron: I have no other questions.

The Court: Thank you Mr. Bucci.

(Witness excused.)

[25] Certificate of Reporter

I, Edsel E. Colvin, a Certified Shorthand Reporter, do hereby certify that I was the Official Court Reporter in Division No. 1, of the 22nd Circuit Court of the State of Missouri, located in the City of St. Louis, State of Missouri, at the time the foregoing proceedings were had, and I further certify that the foregoing twenty-four pages is a complete and accurate transcript of the witness, Robert A. Bucci, taken on February 7, 1974.

/s/ EDSEL E. COLVIN
EDSEL E. COLVIN, C.S.R.
Official Court Reporter
Division No. 1, Circuit Courts
City of St. Louis
State of Missouri

APPENDIX F

RULES OF CIVIL PROCEDURE

8107 When Party May Appeal After Time for Filing of Notice Has Expired

(a) *Appeal by Special Order—Motion—Notice.* When an appeal is permitted by law from a final judgment in the trial court, but the time prescribed for filing the ordinary notice of appeal with the clerk of the trial court as set forth in Rule 81.04 has expired, nevertheless a party seeking reversal of such final judgment may file a notice of appeal in the trial court, within 6 months from the date of such final judgment, if permitted to do so by a special order of the appropriate appellate court. The special order may be allowed by the appellate court, upon motion and notice to adverse parties, and upon a showing by affidavit, or otherwise, that there is merit in the appellant's claim for the special order and that the delay was not due to appellant's culpable negligence. When notified of the issuance of a special order by the appellate court the clerk of the trial court in which the final judgment was entered shall permit the appellant to file a notice of appeal within 10 days after such notification and the appellant shall then proceed to prepare the transcript on appeal as if the appeal had been allowed without a special order.

(b) *Power to Issue Stay—Supersedeas in Special Appeals.* When an appeal is taken after a special order the power to issue a stay is lodged exclusively in the appellate court, which may in its discretion decline to issue a stay or may issue a stay upon such terms with respect to a supersedeas bond as may be appropriate, and in general accord with Rule 81.09. The supersedeas bond shall be filed in the trial court and the sureties therein shall be subject to the jurisdiction of the trial court as indicated in Rule

81.11. If a final judgment in the trial court is reversed or modified by the appellate court such reversal or modification shall not affect the rights of any person, not a party to such suit, acquired in good faith after expiration of the time prescribed for taking an appeal without a special order, but before the filing of the notice of appeal by special order.

(Adopted Feb. 1, 1972, effective Sept. 1, 1972.)

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-841

LESTER L. FULTON,
Respondent,

vs.

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,
Petitioner.

On Petition for Writ of Certiorari to the
Supreme Court of the United States

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's Brief Fails to Address the Constitutional Issues Raised in the Petition for Certiorari

The crux of the petition for certiorari in this case is that petitioner was denied due process because it was not given notice of the hearing on damages and was therefore deprived of the opportunity to prevent the improper entry of judgment on a cause of action or causes of action not pleaded in the respondent's complaint. Although the petition for certiorari thus raises

a novel question of whether the Missouri courts provided sufficient notice to petitioner in default proceedings, respondent's answering brief to this court remarkably fails to confront this question.

Instead, respondent's brief clouds the issues in this proceeding by misstating certain important aspects of the circumstances surrounding this litigation. Thus respondent's brief at page 2 makes the extraordinary contention that "defendant had more notice to appear to defend at a hearing on June 28, 1973, to prove up the plaintiff's damages than has ever been required by the United States Constitution." This statement is not accurate. The record is clear that petitioner never received *any* notice of the June 28 hearing (or respondent's memorandum of law filed at that hearing), and was therefore deprived of its right: (1) to test respondent's evidence of damages; or (2) to contest the propriety of proving damages on causes of action not pleaded in the complaint and of which petitioner had no prior notice. Indeed, at this June 28 hearing the lawsuit was fundamentally transformed from one based upon the Missouri Service Letter Statute, Mo. Rev. Stat. § 290.140, into litigation for breach of an employment contract and tort.

Petitioner submits that a significant question of constitutional law is involved here. Even a party against whom an interim default judgment has been entered deserves constitutional protection from having its ultimate and final liability on an interim judgment determined without its participation when the final judgment is based upon damages arising from causes of action not asserted in the complaint. Without notice of the hearing on damages or the memorandum of law filed by respondent, petitioner was unable to protect itself from the gross and fundamental irregularities at the June 28 hearing, *on which the final judgment against petitioner was based*. Yet respondent's brief fails utterly to discuss the propriety and constitutionality of a court entering judgment for $96,000 against a defendant without providing any notice to the defendant of the plaintiff's proof of damages or the shift in the theories of recovery.

Respondent makes a considerable effort to prove in its brief that the original house counsel handling this matter for petitioner was remiss in allowing the interim default judgment to be entered. But no amount of proof of negligence can obscure the fundamental constitutional principle that a judgment entered without notice and opportunity to be heard is void. *Wooden v. Friedenburg*, 198 S.W.2d 1 (Mo. 1946); *State ex rel. Rhine v. Montgomery*, 422 S.W.2d 661 (Sprg. Ct. App. 1967). Petitioner respectfully submits that, regardless of why petitioner's counsel failed to appear to prevent the entry of the interim judgment, the failure to provide petitioner notice of the subsequent damage hearing on June 28, 1973, at which respondent obtained recovery on causes of action not pleaded, rendered the final judgment for damages void. No amount of proof of negligence can legitimize, justify, or immunize from attack a judgment which is void.

Furthermore, respondent does not effectively respond to the second aspect of petitioner's stated grounds for requesting certiorari; namely, that the final judgment and damages entered thereon in the respondent's action was based upon a cause of action or causes of action not set forth in respondent's original complaint. Respondent implies at pages 10 and 11 of his brief to this court that petitioner has somehow distorted the basis for the trial court's judgment after the June 28 hearing. Thus respondent asserts that the petitioner has sought to "ferret out isolated matters of evidence and imply that the Court relied on certain specific items of evidence in arriving at its decision" at the June 28 hearing. But the transcript of the June 28 hearing and the respondent's very memorandum of law submitted to the court at that hearing show that the trial court's judgment *must* have been based upon causes of action not set forth in respondent's complaint.

As was stated in petitioner's petition for certiorari at 9, "the plaintiff failed to prove any loss of employment opportunity based upon a failure to provide a service letter," the only cause of action stated in respondent's complaint. Since such proof was utterly lacking in the proceedings before the trial court and since that is the only ground upon which damages pursuant to the Missouri Service Letter Statute can be based, it is apparent that the trial court's judgment must have been based upon causes of action not stated in the complaint. Accordingly, since petitioner had no prior notice of such causes of action, the judgment is constitutionally defective. *Reynolds v. Stockton*, 140 U.S. 254, 270 (1891).

Respectfully submitted

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